92-448

No.

Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALVAADER FRAZIER,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

ARTHUR R. BLOCK
Counsel of Record for Petitioner
250 West 57th Street
Suite 317
New York, New York 10019
(212) 956-5550

Of Counsel:
ARTHUR R. BLOCK
MICHAEL A. HARDY
LAWRENCE A. GRIGSBY

QUESTIONS PRESENTED

Given that the abstention doctrine generally precludes federal district court adjudication of constitutional challenges to ongoing state bar disciplinary proceedings, and that a state court system may have an institutional bias against acknowledging unconstitutional discrimination on the basis of race, gender, class, and political affiliation in its own disciplinary practices, should the discretionary jurisdiction of the United States Supreme Court be used to review a serious claim of violations of an attorney's constitutional rights?

Did the State Bar of California violate petitioner's due process, equal protection and first amendment rights by selectively prosecuting her, subjecting her to a trial before a "prosecuting judge," and denying her a fair

opportunity to prove that the bar's disciplinary system was structurally biased against African Americans, women, and solo practitioners?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED.	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	20
THE CALIFORNIA SUPREME COURT HAS DECIDED AN IMPORTANT ISSUE OF CONSITUTIONAL LAW THAT SHOULD BE SETTLED BY THIS COURT	20
A. Given The Abstention Doctrine's Limitations On District Court Review, This Court Has A Unique Role To Play In Assuring The Constitutionality of State Bar Disciplinary Practices	20
B. This Case Presents A Stark Record Of Unwillingness By A State Bar System To Police Itself For Constitutional Violations	26

1. State Bar Reform Legislation 26
2. The Proceedings in the State Bar Court 33

The State Bar Court's Repeated Refusal to Disqualify the Referee Violated Due Process of Law 51

Violations of First Amendment Rights and Equal Protection 55

CONCLUSION 61

APPENDIX

Order of the California Supreme Court (June 15, 1992) 1a

Opinion of the Review Department of the State Bar of California (Oct. 10, 1991) 5a

Order Modifying Opinion, Review Department of the State Bar of California (Jan. 9, 1992) 135a

Modification of Order Modifying Opinion, Review Department of the State Bar of the State of California (Feb. 4, 1992) 138a

TABLE OF AUTHORITIES

Page

Cases

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 22, 23

Frazier v. State Bar of California, Docket No. 89-55675 (Jan. 14, 1991, 9th Cir.) 11

Frazier v. State Bar of California, CV 88-4648 WDK JRx) (C.D. Cal.) . . . 8

Frazier v. State Bar of California, CV 89-2586 WDK (Order Dated May 12, 1989, C.D.Cal.) 11

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) 20

In re Primus, 436 U.S. 412 (1978) . . 23

In the Matter of Alvaader Frazier, No. 90-TE-14293 (Cal. St. Bar Ct., Hearing Dept). 7, 16

In the Matter of Alvaader Frazier, No. 84-0-12333, 91 Daily Journal D.A.R. (Cal. St. Bar Ct., Review Dept., Oct. 10, 1991) . . . . . passim

In re Murchison, 349 U.S. 133, 137 (1955) 51, 53

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 51, 54

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) 21, 25

NAACP v. Button, 371 U.S. 415 (1963) 23, 55

Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232 (1957) 57

Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968) 59, 60

Taylor v. Hayes, 418 U.S. 488 (1974) 52

Ungar v. Sarafite, 376 U.S. 575, 588 (1964) 53

Younger v. Harris, 401 U.S. 37 (1971) 21

Constitution, Statutes and Regulations

United States Constitution, First Amendment 3

United States Constitution, Fourteenth Amendment, Sec. 1 4

California Business and Professions Code § 6007(c) . . 7-9, 15

Other

Capps, "Willie Brown's Bill Would End State Bar," San Francisco Examiner, July 21, 1992 32

Fellmeth, "The Disciplinary System of the California State Bar: An Initial Report," 7 California Regulatory Law Reporter 1, 19 (1987) 28

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

No.

ALVAADER FRAZIER,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Alvaader Frazier[1] petitions for a writ of certiorari to review the judgment of the Supreme Court of California.

OPINIONS BELOW

The Supreme Court of California entered a judgment, (1a-4a) without opinion, denying petitioner's Petition

---

[1] **Rule 29.1 Statement:** The petitioner is not a corporation. All of the parties to this proceeding are named in the caption.

for a Writ of Review. Petitioner had sought review of an Opinion and Formal Recommendation by the Review Department of the State Bar Court of the State of California (hereinafter "Review Department"). This Opinion (5a-133a) is reported at 91 Daily Journal D.A.R. 12759 (Oct. 10, 1991).[2] The California

---

[2] The Review Department reviewed a decision and recommendation of a hearing panel referee of the State Bar Court, dated June 18, 1990, which is unpublished. The Review Department has the duty to "independently review the record and may adopt findings, conclusions or recommendation and a decision at variance with the hearing department." Transitional Rules of Procedure of the California State Bar, Rule 453(a). Neither the Decision of the Review Department, nor the referee's recommendations, had the legal status of an order or judgment. Only the California Supreme Court has the authority to impose suspension or disbarment upon an attorney. The California Supreme Court did not issue an opinion with its judgment. Copies of the judgment, of the Review Department's Decision and Formal Recommendation, and of two orders making technical modification to the Decision, are reproduced in the appendix.

Supreme Court's Judgment also incorporated the Review Department's Formal Recommendation, which imposed, inter alia, suspension from the practice of law for five years, with a minimum of three years actual suspension.

JURISDICTION

The judgment of the Supreme Court of California denying the Petition for a Writ of Review was entered on June 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is an African American woman attorney and nationally and internationally known advocate for civil and human rights. Shortly after being admitted to practice by respondent, State Bar of California, (hereinafter the "State Bar") on December 3, 1982, petitioner opened a solo community law practice in a poor and working class community in Los Angeles. The

tremendous professional demands of trying to build and maintain such a practice without any outside assistance, compounded by family crises, caused petitioner in May 1985, to close her law office and move to New York City in search of help. (Trial Exhibits P, Q and T. Tr. 6/18/90 pp. 81, 87, 89, 92-93. Tr. 9/28/89, p. 79)[3] At the end of the month, she called the State Bar and informed Investigator David Fritz that she was experiencing a nervous breakdown, had been unable to get help in California and, in Fritz's words, "could

---

[3] These are references to the record of the proceedings before the State Bar Court of the State of California. "Trial Exhibit" refers to exhibits introduced by the State Bar prosecutor. "Respondent Trial Exhibit" refers to exhibits introduced by the petitioner, who was the respondent in the State Bar Court. "Tr." refers to the trial transcript, which is followed by the date of the proceeding and the page of the transcript.

not cope with her work or what she was doing to her clients." (Respondent Trial Exhibit G)

In New York City, respondent successfully participated in psychotherapy that cured the major depression that had disabled her. (Respondent Trial Exhibits P, Q, T. Tr. 6/16/90, p. 92) In or about October 1986, she resumed active bar status, and since that time has led a number of significant legal and political fights in support of civil and human rights, as described in part in numerous declarations, letters of support, amicus statements, and in court testimony (in a State Bar Court related proceeding), by dozens of public officials, attorneys, clients, physicians, mental health professionals, political leaders, among

others.[4] The State Bar did not allege that petitioner engaged in any misconduct in any matter arising after she closed her practice in Los Angeles in May 1985.

In July 1988, the State Bar's Office of Trial Counsel (hereinafter "OTC") filed a proceeding against petitioner under California Business and Professions Code § 6007(c) (hereinafter

---

[4] The most comprehensive list of the written materials submitted at various points in the State Bar proceedings is Appendix B to Respondent's Brief on Review, filed with the Review Department of the State Bar Court. In addition, declarations and in court testimony were presented in a related proceeding before the State Bar Court, In the Matter of Alvaader Frazier, Case no. 90-TE-14293(Cal. St. Bar Ct., Hearing Dept.). The Review Department denied petitioner's motion to augment the record of the principal case to include the record of the related proceeding. (11a-19a)

the "first 6007 proceeding").[5]

Petitioner commenced an action in the United States District Court for the Central District of California seeking a stay of the first 6007 proceeding on the grounds that it was unconstitutional. The State Bar moved to dismiss the action on abstention grounds, stating to the District Court that the petitioner's federal constitutional claims could be presented to and heard by the State Bar Court. The District Court abstained. Frazier v. State Bar of California, CV 88-04648 WDK JRx) (C.D. Cal.).

---

[5] This is a summary proceeding to involuntarily enroll an attorney on inactive status pending trial of disciplinary charges in a plenary proceeding, and pending appeals, if any, from a recommendation to the California Supreme Court for imposition of discipline. The burden in the summary proceeding is upon the OTC to demonstrate that the attorney is presently a danger to her clients or to the public.

Petitioner then presented her federal constitutional arguments to the State Bar Court in a motion to dismiss. On October 3, 1988, while the motion was pending, the OTC withdrew the first 6007 proceeding and petitioner retained her active bar status.

On August 11, 1988, the State Bar commenced an original disciplinary proceeding. Petitioner's Answer to the State Bar's First Amended Notice to Show Cause set forth an affirmative defense alleging that the prosecution violated her federal constitutional rights.[6] Petitioner served discovery demands that

---

[6] The Fourth Affirmative Defense alleged selective prosecution, prosecutorial misconduct, and discrimination on the basis of race and sex; the Fifth Affirmative Defense alleged violation of the First and Fourteenth Amendements; and the Sixth Affirmative Defense alleged denial of due process of law. Respondent's Answer to First Amended Notice to Show Cause (filed May 3, 1989).

were designed to obtain evidence to assist her in developing a case against the State Bar proving discriminatory racial/gender impact in the pattern of its disciplinary prosecutions and dispositions. Petitioner appealed the OTC's refusal to provide essential information in response to the demand through the State Bar Court and the California Supreme Court (Petition for Writ of Review dated April 6, 1992, pp. 15-18, S-025090). (19a-22a)

Trial proceedings in the State Bar Court were presided over by retired Judge John P. Sparrow sitting as hearing panel referee. Based on Judge Sparrow's conduct in pretrial proceedings, as well as the conduct of the OTC in prosecuting this case, petitioner instituted a second action in the United States District Court for the Central District

of California, seeking to stay the State Bar Court proceeding pending adjudication in the federal court of petitioner's constitutional challenges to the proceedings. Once again, the State Bar represented to the District Court that petitioner's federal constitutional claims could be presented to the State Bar Court, in the first instance, and ultimately (if necessary) to the California Supreme Court. The District Court dismissed the action on abstention grounds. Frazier v. State Bar of California, CV 89-2586 WDK (Order dated May 12, 1989, C.D. Cal.). Petitioner appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed. Frazier v. State Bar of California, Docket No. 89-55675 (Jan. 14, 1991, 9th Cir.).

Because of the District Court's denial of a preliminary injunction, hearings in the State Bar Court on culpability issues were held on May 8-11, 1989. On June 12, 1989, Referee Sparrow entered an order finding culpability on each count charged. Hearings on discipline commenced on June 15, 1989. In the midst of hearings on June 16, 1989, petitioner made an emergency oral application to the Assistant Presiding Referee of the State Bar Court, calling for the disqualification of Referee Sparrow on the grounds, inter alia, that he was conducting the hearings as a "prosecuting judge" in violation of petitioner's federal constitutional rights of due process and equal protection of the law.

The Assistant Presiding Referee adjourned the hearing and set a schedule

for presentation of papers and briefs. Petitioner moved both for disqualification of the referee and for dismissal of the proceedings on constitutional grounds. Thirty-seven individuals and organizations from 10 states filed two amicus briefs in support of this relief. The Assistant Presiding Referee denied the motion for disqualification, refused to rule upon the motion to dismiss, and ordered a resumption of the hearings. (Order on Motion to Disqualify Referee, 8/29/89)

Petitioner filed an interlocutory Petition for a Writ of Review with the California Supreme Court which set forth petitioner's federal constitutional challenge to the State Bar Court proceedings. By order dated September 25, 1989, without an opinion or any comment on the merits of the claims, the

California Supreme Court denied the petition.

The discipline hearings resumed on September 27-29, 1989, and were adjourned on September 29, 1990 during which time petitioner made a renewed motion to disqualify the referee and to dismiss the proceedings based on new actions by the referee that petitioner asserted violated, inter alia, her rights under the due process and equal protection clauses of the United States Constitution.

On June 18, 1990, the referee issued a Decision recommending that respondent be disbarred, and requested that the Director, Office of Investigation, commence an investigation of the conduct of respondent's attorneys leading to possible discipline, and requesting that the Presiding Referee

revoke their pro hac vice admissions. Petitioner filed a timely request for review and a supporting brief with the Review Department.

On July 26, 1990, pending review of the referee's recommendation, OTC commenced a second proceeding against the petitioner under California Business and Professions Code § 6007(c) (hereinafter the "second 6007 proceeding"). Because of the implementation of reforms imposed on the State Bar Court by the California Legislature, the summary hearing of this application was not assigned to Referee Sparrow, but instead to a full time State Bar Court Judge, Hon. Ellen Peck. After deliberating upon extensive written documentation and affidavits describing petitioner's professional activities since 1986, and hearing testimony from Dr. Lenora B.

Fulani, Rev. Alfred C. Sharpton, and Ms. Elizabeth Maria Munoz about petitioner's representation and advocacy in civil and human rights causes, Judge Peck denied the OTC's application. She found that far from petitioner's current activities being a threat to clients or the public, petitioner had presented a "substantial case showing that there . . . would be substantial harm, in fact, to the public were her [petitioner's] services not available." In the Matter of Alvaader Frazier, case no. 90-TE-14293 (Hearing Transcript, September 14, 1990, p. 105.)

Petitioner presented her federal constitutional claims in her papers filed with the Review Department. The Review Department filed a decision on October 10, 1991 (5a-133a). The Decision reversed several of the referee's findings and rejected his

recommendation of disbarment, substituting a recommendation for suspension from practice and various conditions. However, the 60 page decision only touched briefly upon petitioner's federal constitutional claims, and rejected them (19a-32a).

Petitioner timely filed a Petition for a Writ of Review with the California Supreme Court. The Petition alleged three grounds for reversal, each of which set forth federal constitutional claims.[7] The California Supreme Court

---

[7] The first ground was "Denial of Discovery of Institutionalized Discrimination." Petitioner argued that the State Bar Court had prevented her from developing an evidentiary record to support her claim of unconstitutional selective prosecution and discrimination by denying her necessary discovery from the State Bar.

The second ground was "Disqualification of the Hearing Panel Referee." This set forth both federal and state authorities on due process of law.

(continued...)

denied the Petition without opinion on June 15, 1992 (1a-4a).

As set forth above, from the beginning of the State Bar Court proceedings and at every level thereof, including two petitions for review filed with the California Supreme Court, the petitioner has repeatedly and vigorously asserted the federal constitutional claims which are the subject of the instant Petition for a Writ of Certiorari. Petitioner's central concern throughout these proceedings has

---

[7](...continued)
The third ground was "Fundamental Unfairness and Specific Prejudice." Again, petitioner argued that the proceedings in the State Bar Court prior to the Review Department were so fundamentally unfair in their totality as to deny her due process and equal protection of the laws. ("Specific prejudice" is a term used in a leading California Supreme Court case addressing when delays in the prosecution of an attorney discipline case is ground for dismissal.)

been that under our constitutional system of government no person should be subjected to the kind of biased and unfair prosecution that the State Bar perpetrated on her from 1988 to 1991.

REASONS FOR GRANTING THE WRIT

THE CALIFORNIA SUPREME COURT HAS DECIDED AN IMPORTANT ISSUE OF CONSITUTIONAL LAW THAT SHOULD BE SETTLED BY THIS COURT

A. Given The Abstention Doctrine's Limiations On District Court Review, This Court Has A Unique Role To Play In Assuring The Constitutionality of State Bar Disciplinary Practices

This case presents a question of national importance about the balancing of the federal judicial policy of deference to state disciplinary proceedings under the abstention doctrine, on the one hand, and this Court's role in reviewing state bar policies and practices that allegedly trench upon the constitutional rights of attorneys and the public, on the other.

In Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), this Court stated that:

> The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically have been "officers of the courts."

In deference to this state interest, this Court has expressly made the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971) applicable to actions seeking to enjoin pending state attorney disciplinary proceedings. In Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982), this Court held that the federal district courts should not even entertain constitutional challenges to such proceedings unless the plaintiff can demonstrate that he or she is not afforded an adequate opportunity to raise the constitutional issues before the state tribunals.

At the same time, this Court has not relinquished its primacy as the adjudicator of claims that state bar policies and practices violate constitutional rights. Indeed, this Court has been astute to recognize that in the area of attorney discipline there is a possibility of institutional self-interest and bias of the state bars contributing to an improperly narrow interpretation of the first amendment, and of the due process and equal protection clauses of the Constitution. For example, in its landmark decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), this Court struck down certain restrictions on advertising by lawyers as violative of the first amendment. Such restrictions were widely seen as an anti-competitive regulation that benefited some segments

of the bar at the expense of other lawyers and of potential clients who sought more information about choosing a lawyer and about the reasonableness of legal fees.

A year later, this Court struck down discipline imposed upon a lawyer engaged in personal solicitation. In re Primus, 436 U.S. 412 (1978). The lawyer was acting on behalf of a civil liberties organization in challenging a program requiring sterilization as a condition to continued receipt of public medical assistance. Thus, while Bates highlighted the pecuniary interests that could infect state bar discipline with constitutional infirmities, Primus pointed out the potential for ideological censorship. It was in the tradition of this Court's landmark ruling in NAACP v. Button, 371 U.S. 415

(1963), which protected attorneys engaged in civil rights advocacy and representation in the South from being harassed with disciplinary prosecutions.

In the instant case, petitioner promptly and persistently asserted her claim that the disciplinary practices of the California State Bar were institutionally biased against African American and woman attorneys, and solo practitioners. She claimed that the State Bar had ignored pending client complaints against her for three years, and then, when petitioner's political activities and advocacy were gaining notoriety, the State Bar selectively prosecuted her on the basis of the long dormant complaints. As the proceedings in the State Bar Court unfolded, she repeatedly asserted that the hearing panel referee was functioning as a "prosecuting judge"

who denied petitioner the semblance of a fair trial.

Twice, petitioner brought actions in the District Court seeking to enjoin the ongoing state proceedings. Both times the District Court abstained, applying the Middlesex doctrine. Hence, now that the petitioner has exhausted every avenue within the state system to present her federal constitutional claims, this Petition for a Writ of Certiorari is her first opportunity for federal court consideration of her claims.

Petitioner respectfully submits that this case presents an important issue of federal judicial policy and constitutional law with respect to the role of this Court in assuring the constitutionality of state disciplinary systems that are susceptible to economic

and ideological self-interests and biases, given the unavailability of the District Courts to perform this function.

B. This Case Presents A Stark Record Of Unwillingness By A State Bar System To Police Itself For Constitutional Violations

1. State Bar Reform Legislation

In 1986 and 1988, the California Legislature enacted legislation to reform the disciplinary procedures of the State Bar. (1986 Cal. Stat. ch. 1117; 1988 Cal. Stat. ch. 1159.) The reform legislation was a response to the widespread public dissatisfaction with a disciplinary system shown to be arbitrary and ineffective. Because of the State Bar's failure to generate useful information or self-evaluations to assess its functioning and to

consider further improvements, the Legislature created and funded the office of State Bar Discipline Monitor, to serve as an independent investigator and factfinder. Cal. Bus. & Prof. Code § 6086.9. Added by 1986 Cal. Stat. ch. 1114; amended by 1988 Cal. Stat. ch. 1159. One of the Discipline Monitor's findings was that the State Bar had erected a protective shield preventing itself from scrutiny about the pattern and practices of its disciplinary operations, so far as possible discriminatory bias is concerned.[8]

---

[8] State Bar records of disciplinary cases are not maintained, archived, indexed, stored or made available for retrieval in a manner that makes it feasible for an outside investigator to attempt to research the question of discrimination and bias. Indeed, the State Bar Discipline Monitor found that at the OTC:

> All other OTC files in the Los Angeles office -- representing two-thirds of OTC output had been

(continued...)

One of the Legislature's main reforms was to eliminate the State Bar's practice of hiring retired judges on a per diem basis to preside over the trials of all disciplinary cases that were expected to require a hearing of

---

[8](...continued)
routinely shredded and that virtually no such pre-1987 files were available. We managed to save one box about to go to the shredder. Some of the attorneys in the OTC were under the impression that when they give up the files (after the case is 'over'), these files were archived.

The bar's initial justification for this procedure is to note that "the State Bar Court file is still available." However, the "State Bar Court file" has only publicly filed information. If there has been a stipulated settlement in the case, there might not even be a hearing transcript in the State Bar Court file; there would certainly not be any investigative material. This investigative material is extremely important....

(Emphasis supplied) R. Fellmeth, "The Disciplinary System of the California State Bar: An Initial Report," 7 California Regulatory Law Reporter 1, 19 (1987).

more than one day in duration. 1988 Cal. Stat. ch. 1159, repealing Cal. Bus. & Prof Code § 6079, and adding new § 6079.1. One of the consequences of this practice was that the pool of referees was extremely disproportionately white and male, since forty years ago there were very few minority or women attorneys entering practice. The reform legislation replaced the pool of retired judges with a staff of full time professional referees in the State Bar Court. The Legislature also professionalized the Bar Court by eliminating a Review Department consisting of an unwieldy single panel of 18 persons serving on a part time basis, with a full-time panel of three judges. Id.

The instant case was one of the last, if not the last, major disciplinary case that was prosecuted and tried

under the discredited system. The decision to reactivate old complaints against petitioner and to prosecute her was made by the Office of Trial Counsel functioning in secrecy and without accountability. The evidentiary hearings in the case in chief were conducted by a retired judge. Significantly, the one evidentiary hearing conducted under the new system, the hearing on the OTC's second 6007 application (an attempt to summarily enroll petitioner on inactive status) resulted in a dramatically different perspective on the case by full time Judge Ellen Peck, than had been taken by Referee John Sparrow.

Petitioner was prosecuted and tried under the old structures, and her final appeal within the State Bar Court system was heard by the newly constituted

Review Department. While petitioner respectfully disagrees with many of the specific conclusions of the Review Department, she acknowledges that the new appeal body conducted a review and analysis of the record and of the parties' legal contentions -- except for the federal constitutional issues (and related state law due process issues). Petitioner demonstrated to the Review Department (and to the California Supreme Court) that the OTC and the State Bar Court, operating under the old structure, had trampled upon her constitutional rights. But the state system was unwilling to take responsibility for what may be the last ugly vestige of a now defunct system for prosecuting and trying cases.

In short, the California State Bar, which had been in a defensive posture

for many years because of the arbitrariness and unfairness of its attorney discipline system, had an institutional interest in closing the books on the old system at the expense of the petitioner's constitutional rights.[9] This Court is the only available forum to vindicate petitioner's rights. By taking review of this case, this Court will inform state bar systems nationwide that the most careful and unbiased consideration must be given to federal constitutional claims asserted in attorney disciplinary proceedings, regardless of how embarras-

---

[9] The defensive posture is likely to continue. "Assembly Speaker Willie Brown, perhaps the [California] Legislature's most well-known lawmaker, has introduced a measure to abolish the State Bar in its current form and create a state board to regulate California attorneys" Capps, "Willie Brown's bill would end State Bar," San Francisco Examiner, July 21, 1992.

sing a full and fair hearing of the claims may be to the state bar.

2. The Proceedings in the State Bar Court

As described above, one reason why the record of the instant case is appropriate for this Court's review of the constitutionality of state bar practices is that petitioner was prosecuted and tried by a disciplinary system that the California Legislature, and the Discipline Monitor it appointed to investigate the system, have already found to be arbitrary and unfair. Complementing the legislative and structural setting of the instant case, another reason why this record is ripe for review is because in this particular case, the potential for abuse of an attorney's rights became manifest in the proceedings. At the very beginning of the case, petitioner tried to challenge

the prosecution of the case on constitutional grounds, both with respect to selective prosecution of her case, and with respect to systemwide invidious bias in prosecutorial decisions. As the trial proceedings unfolded over a two year period, the hearing panel referee's escalating violations of the fundamental due process rights of the petitioner became a painful illustration of a biased, result-oriented, discriminatory tribunal.

Petitioner presented carefully documented and thoroughly briefed appeals to the State Bar Court's Discovery Review Referee, the Assistant Presiding Referee, the Presiding Referee, and, finally, the Review

Department.[10] However, these tribunals would not acknowledge clear evidence of the following ways in which respondent was denied a fair trial.

First, the hearing panel referee was determined to make maximum findings of culpability regardless of whether the prosecutor could prove its case under the rules of evidence and the rules of procedure.

Second, disregarding the applicable legal standards and the evidence

---

[10] Petitioner described and documented in detail the improper, biased and prejudicial conduct of the referee. See, e.g., Respondent's Joint Motion for Disqualification and Recusal of Hearing Referee and for Dismissal of Proceeding (July 8, 1989); Respondent's Joint Motion to Reconsider and Vacate Order (November 5, 1989); Respondent's Joint Motion to Vacate Order to Show Cause Re Contempt (December 26, 1989); Respondent's Brief on Review (Oct. 4, 1990) See also Petition for Writ of Review and Memorandum of Points and Authorities, California Supreme Court Case No. S-025090 (April 6, 1992).

presented by respondent, the hearing panel referee implemented an extra-legal ideological standard which held that petitioner's history as a poor African American woman who had an emotional breakdown while trying to operate a solo community practice, and who later rehabilitated herself and rededicated her talents to human rights causes, would not be considered in mitigation of discipline. He explicitly stated in his decision that to do otherwise would constitute "unconstitutional affirmative action." Decision of Hearing Panel Referee (John P. Sparrow), June 18, 1990, p. 51 (hereinafter "Referee's Decision").

Third, the referee was openly hostile to the efforts of the petitioner and her counsel to question his impartiality and to charge the Office of

Trial Counsel with selective prosecution.[11]

Fourth, the Hearing Department prevented the petitioner from taking the deposition of the State Bar and from obtaining meaningful responses to pattern and practice discovery requests, which the petitioner needed to develop her constitutional affirmative defenses

---

[11] This hostility was not only expressed in his demeanor, but also in a series of extraordinary rulings in which he asserted that he had the power to sanction the respondent and her attorneys in ways that clearly exceeded his authority. For example, he entered an unprecedented default sanction against the respondent and struck her answer to Count Five. He issued an order to show cause claiming the power to revoke the pro hac vice admissions of respondent's principal attorneys, a status which had been granted by his superior, the Presiding Referee (and which even the Presiding Referee lacked power to revoke). See Respondent's Memorandum of Points and Authorities in Support of Joint Motion for Reconsideration and Other Relief dated November 5, 1989, Point III, pp. 15-23.

based on institutionalized bias and selective prosecution by the State Bar.

The Review Department's Opinion on Review does not evaluate the totality of the proceedings in the Hearing Department. It disposes of the critical constitutional issues by isolating three elements of petitioner's argument and rejecting them one by one. (19a-33a)

First, in response to respondent's recountings of the numerous instances in which the referee conducted the proceedings in an obviously biased manner and expressed hostility to the petitioner and her counsel, the Review Department finds that the referee exerted "reasonable control over the conduct of the proceedings." (28a) However, there is no explanation of how it was reasonable for the referee to

"control" the proceedings by, among other mechanisms:

a. Directing the audiotechnician recording the proceedings in rapid succession to turn the tape machine "on" and "off" in order to prevent the referee's improper threats and his hostile commentary from becoming part of the official record (see, e.g., Tr. 3/29/89, pp. 45-46);

b. Officially terminating the disciplinary hearing phase of the proceedings in the middle of testimony and purporting to enter a default against the petitioner, and then, after recognizing he had no authority to enter a default, attempting to falsify the record by stating in a

subsequent order that he had merely terminated the day's testimony;[12]

---

[12] Referee Sparrow not only tried to control the record by turning off the tape machine, he has also attempted to distort the events and statements that are reported on the transcript. The transcript of September 29, 1989, concludes:

> REFEREE SPARROW: Which, the Court is now repeating, was, frankly, in the form of a threat that if Counsel did not allow this proceeding to begin with the direct examination, in obedience to the Judge's order, of the witness currently on the stand, that their conduct would be taken as a default. And, as a basis of having reopened the record, and having given that threat, these proceedings are now terminated. (Proceedings terminated at 12:42 p.m.)

Emphasis supplied. (Tr. 9/29/89 p. 59)

As the above-quoted section makes plain, Judge Sparrow terminated the proceedings on September 29, 1989. However, after the prosecutor filed an ad hoc pleading (Request for Clarification, 9/29/89) stating that Referee Sparrow had exceeded his authority in purporting to enter a default, Sparrow issued orders that changed the language

(continued...)

c. Attempting to revoke the pro hac vice status of petitioner's principal attorneys so that she would be denied counsel of her choice who had been representing her for two years in this very proceeding (see below);

d. Failing to enter an order implementing an uncontested motion that he had granted (after an intense and lengthy colloquy); then, at a subsequent session, denying that he had ever granted the motion; then, upon being confronted with a transcript

---

[12] (...continued)
of his statements. He did not say he made a mistake, and now was reversing his decision. (This would have raised serious legal issues.) Instead, he falsely asserted in one order that he had only terminated "the testimony" (Order on Continued Hearing Date, 10/11/89), and in another that he only had terminated "that day's proceedings" (Order to Show Cause, 10/19/89).

showing he had granted the motion, saying that he had "changed his mind." (see Tr. 6/15/90 p. 46; Tr. 9/28/90 pp. 138-140, 149);[13]

e. On the first day of the culpability trial directing the petitioner through her counsel to appear in court the next day even though respondent had an explicit legal right under the Rules of Procedure of the State Bar to

---

[13] Significantly, petitioner's unopposed motion sought to have placed under limited seal a psychotherapy report containing highly personal and sensitive information about petitioner's childhood, and family and personal life, so that it could not be copied by the press and members of the public and distributed or published. The referee's determination to open up the petitioner's intimate life to the public was representative of his singleminded attempts to make the trial process itself, as well as the ultimate discipline imposed, as punitive as possible.

appear by counsel rather than personally;

f. Denying trial motions by petitioner before they were made (see Tr. 6/15/89, pp. 7-8); refusing to let counsel be heard in opposition to an objection and a motion made by OTC (See Tr. 9/28/89, p. 18 Tr. 9/28/89 pp. 18-20, Tr. 9/29/89 pp. 52-53); falsely accusing counsel of improperly causing delays in the proceeding,[14] and of incompetence or misconduct in failing to mention relevant authority in legal argument (Compare Tr. 5/11/89 pp. 21, 26 with Referee's Decision, pp. 33-34); and adopting a disrespect-

---

[14] Although respondent showed that this was false, in her Memorandum of Points and Authorities, 11/5/89, p. 13, the Referee's Decision repeats this charge on page 2.

ful demeanor towards the petitioner and her counsel (See, e.g., Tr. 9/28/89 pp. 35-44).

Second, the Review Department finds that the referee did not display a possible bias against the petitioner and her counsel by secretly sending a letter to a Supreme Court Judge in New York, before whom the petitioner and Mr. Hardy, one of her counsel in the instant proceeding, were engaged in representing a young man accused of homicide. (Respondent's Ex. AA) The Review Department says that "the hearing referee accurately advised the New York judge of the nature and status of the public California disciplinary proceedings . . . . " (30a) It ignores that the "accurate" information was irrelevant to the purported purpose of the communication and highly selective

and prejudicial to the petitioner and her attorneys. By sending the letter without notice to petitioner it deprived her of an opportunity to object to the content of the letter in advance, to seek relief from the Presiding Referee to prevent its transmission, or to send a simultaneous communication to the New York judge. As the referee must have anticipated, the New York judge felt compelled to disclose the letter to the respondent and Mr. Hardy's client and to their adversaries. Any reasonable person would have entertained the possibility that the referee's intention was to injure the petitioner and her counsel in their relationship with their client in New York, with the trial judge before whom they were engaged in a major trial, and to provide prejudicial information to her adversaries in that case.

Similarly, the Review Department tries to minimize the referee's extraordinary efforts to remove petitioner's counsel from the case by revoking their pro hac vice status or by threatening them with contempt sanctions. In order to do so, the Review Department makes two material misstatement of fact. It says that the referee "recommend[ed] to the State Bar Court that the pro hac vice admission of both counsel be revoked." (29a) It also alleges that, "The hearing referee was careful to refer these determinations to other bodies for final determination." (31a)

In truth, the referee and the Presiding Referee issued a series of orders regarding this matter, each successive one trying to correct a legal misstep from the one before. It is

critical to recognize that the first order entered by the referee directed that he would hold a hearing on the issue of revocation of pro hac vice status and that he would make the decision. It was only after the petitioner objected that the referee had no power to revoke a grant of pro hac vice status that had been granted by the Presiding Referee, and that a long line of United States Supreme Court precedents established that for a trial judge to preside over a hearing over a matter in which he is "embroiled" violates due process of law, that a series of subsequent orders were entered by the Presiding Referee and the referee trying to find some legal and constitutional mechanism for sanctioning petitioner's

counsel.[15] The Review Department's mischaracterization of the content and sequence of these orders covers up the plainly result-oriented and biased character of the referee's conduct of the trial.

Petitioner has never argued that erroneous decisions by a presiding judge are, in and of themselves, proof of lack of impartiality. But this is a record in which the referee not only engaged in the kind of overtly prejudicial conduct referred to above, but in more than two years of proceedings he did not grant a single motion made by the petitioner.

---

[15] See Order to Show Cause Re Revocation of Pro Hac Vice Admissions (Referee Sparrow), 10/19/89; Order Delegating Authority (Presiding Referee Mackey), 10/24/89; Order to Show Cause Re Contempt and Amended Order to Show Cause Re Revocation of Pro Hac Vice Admissions (Referee Sparrow), 11/28/89.

The relevance of the pattern of the referee s rulings to his bias is well illustrated by his frenzied and frivolous efforts to find culpability on Count Five (Brumback). The referee defaulted the petitioner, introduced prejudicial hearsay evidence, and formulated one specious legal rationale after another in rapid succession.[16]

---

[16] The entire case against the petitioner on Count Five consisted of information contained in an unsworn handwritten complaint allegedly submitted by Brumback on May 4, 1985, and a brief reply to a routine State Bar inquiry. OTC's trial strategy was to prove a prima facie case by compelling testimony by the petitioner. However, because OTC had not subpoenaed petitioner, it tried to introduce documents into evidence through its investigator. The referee initially rejected the OTC's offer of these documents, on hearsay grounds. Tr. 5/8/89, pp. 188-89. Two days later the referee reversed himself and admitted the documents into evidence by suspending the hearsay rule as a "sanction" against petitioner for refusing to take the witness stand in the prosecution's case. Later still,

(continued...)

Although the Review Department reverses all of the referee's rulings, it does not consider that his modus operandi could create a doubt in the mind of a

---

[16] (...continued)
the referee changed course again. He reopened the culpability trial after both sides had rested, and said that if the petitioner did not take the witness stand he would strike her answer to Count Five and enter a default against her. The referee thereupon entered a default. When petitioner's counsel asked him upon what authority a default could be entered under such circumstances in a State Bar Court proceeding, the referee uttered a Latin phrase, Tr. 5/10/89, pp. 130-31.

When the referee issued his decision, apparently recognizing the lack of authority for his striking of petitioner's answer (or for his already abandoned position of introducing hearsay documents as a "sanction"), he set forth an entirely new, elaborate legal argumentation grounded on traditional hearsay rule exceptions. Petitioner demonstrated in her Brief on Review that this argumentation was utterly without merit, and the decision of the Review Department substantially follows petitioner's legal reasoning. (62a-86a)

reasonable person about his impartiality.

The State Bar Court's Repeated Refusal to Disqualify the Referee Violated Due Process of Law

In Mayberry v. Pennsylvania, 400 U.S. 455 (1971), this Court held that a trial judge violated the due process clause of the fourteenth amendment by presiding over a contempt hearing himself, rather than referring the matter to a different judge. The Court quoted from In re Murchison, 349 U.S. 133, 137 (1955), where it had said:

> Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

(emphasis supplied) 400 U.S. 455, 465.

Applying that principle to the facts at hand, the Court in Mayberry said that the trial judge could not adjudicate his own accusations of

contempt because he had become "embroiled in a running, bitter controversy." 400 U.S. 455, 465. In a concurring opinion, Justice Harlan placed emphasis on the need for "the appearance of evenhanded justice which is at the core of due process." Id. at 469.

This Court gave even greater force to the constitutional requirement for the "appearance of evenhanded justice" in Taylor v. Hayes, 418 U.S. 488 (1974), a case involving a contempt proceeding against a retained attorney. The Court held that even when the conduct of an attorney does not raise to the level of a personal attack on the judge, the judge would be acting improperly to preside over the contempt hearing if he was embroiled in the controversy. The Court said:

> [T]he inquiry must be not only whether there was actual bias

> on respondent's [the judge's] part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136 (1955).

418 U.S. 488, 501.

John P. Sparrow's conduct in this case is a classic case of a "prosecuting judge" (In re Murchison, 349 U.S. 133, 137). He fit this role quite literally, for example, in his attempts to justify a culpability finding on Count Five (see note 16, supra). Not one of the ever-changing and convoluted legal theories advanced by Referee Sparrow (and rejected by the Review Department) was

originally proposed by the prosecutor. The referee developed all of them. The judge stepped into the shoes of the prosecutor. Clearly, the referee became "embroiled in a running, bitter controversy," (Mayberry, 40C U.S. 455, 465) and his conduct as presiding judge destroyed the "appearance of evenhanded justice" (Mayberry, 400 U.S. 455, 469).

These due process principles apply, as well, to the totality of Referee Sparrow's conduct. Especially noteworthy are his attempts to preside over hearings regarding revocation of pro hac vice status and regarding contempt sanctions against petitioner's attorneys. The Review Department concludes that because the referee and the Presiding Referee backed off, in part, from allowing the referee to preside over the revocation and contempt

proceedings, the issue of bias is eliminated. But bending in the face of petitioner's compelling due process arguments cannot erase the evidence of bias contained in the referee's original attempts at usurping powers that clearly were not his under California law, and which would violate federal constitutional protections if he attempted to exercise them.

Violations of First Amendment Rights and Equal Protection

In NAACP v. Button, 371 U.S. 415, 429 (1963), this Court held that the first amendment protects "vigorous advocacy" as well as "abstract discussions." The Court noted that for African Americans and similar minorities, "litigation may well be the sole practicable avenue open to . . . petition for redress of grievances." (Id. at 430). That case grew out of the

efforts of the State of Virginia to effectively bar NAACP lawyers from representing needy citizens by prosecuting the lawyers under an anti-solicitation statute. The Court recognized the "dearth of lawyers" available to handle civil rights cases in Virginia and found that the statute was being used as a "weapon of oppression" (Id. at 436) to interfere with the freedom of association of the attorneys and their clients or prospective clients.

Petitioner is a lawyer in the African American peoples' lawyer tradition. She, and lawyers, legal workers and activists whom she organized to work with her in the International Peoples' Law Institution have represented many controversial political leaders and many controversial causes in

human rights and civil rights battles.[17] The California State Bar let complaints against her lay dormant for three years, and then, suddenly, as she was becoming nationally known as a progressive Black political lawyer, the California State Bar began prosecuting her and pushing relentlessly to stop her immediately from practicing law and ultimately to disbar her entirely.

While no attorney should be selectively prosecuted by the State Bar or subjected to a fundamentally unfair

---

[17] The Court has also applied the due process clause to prohibit states from imposing unreasonable or arbitrary burdens on the rights of clients and controversial attorneys to associate for purposes of legal representation. In Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232 (1957), it held that the New Mexico State Bar had acted in an "invidiously discriminatory" manner in preventing Schware from practicing in New Mexico because his former membership in the Communist Party allegedly showed a lack of "good moral character."

trial proceeding, there is need for special diligence to remedy such abuses when there is evidence showing that the person received such treatment on the basis of one or more constitutionally impermissible criteria, such as race, gender, class or political belief and affiliation. In this case the petitioner was improperly denied discovery to present statistical proof of institutionalized discrimination. As the proceedings unfolded, however, the referee's conduct was so plainly biased against the petitioner, and his demeanor and his ideological expression of hostility to "affirmative action" was so clearly racial and political in character that it became evidence of discrimination in its own right.

This unconstitutional bias became even more evident when the referee

attempted to deprive the petitioner of her chosen counsel in the middle of her trial. In Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968), a federal court upheld the right of Blacks to be represented by out of state counsel.[18] It found that the arrest of attorney Sobol under an unauthorized practice statute was an unconstitutional retaliation against the civil rights activities of out of state attorneys.

---

[18] The California Supreme Court has itself held that the basic right of a party to representation by retained counsel severely limits the discretion of a court to deny pro hac vice admission to a party's counsel of choice. In Magee v. Superior Court, 8 Cal.3d 949, 106 Cal. Rptr. 647 (1973), the defendant was a Black inmate, and an active participant in the "Black Power" movement. The superior court judge refused to allow former Attorney General Ramsey Clark to assist in his defense. The California Supreme Court issued an extraordinary writ to compel granting his admission. Cf. People v. Crovedi, 65 Cal.2d 199, 208, 53 Cal. Rptr. 284, 290 (1966).

The prosecution of Sobol, the Court said,

> was meant also as a warning to other civil rights lawyers and to Negroes in the parish who might consider retaining civil rights lawyers to advance their rights to equal opportunity and equal protection under the Equal Protection Clause of the Fourteenth Amendment.

Id. at 402.

In the face of the strong constitutional challenges by petitioner, a working class African American woman with controversial political affiliations, to the proposed removal of her chosen counsel, the referee largely retreated from this particular attack. Hence, there was no final order of pro hac vice revocation for the Review Department to rule upon. But the initiation and pursuit of this unconstitutional attack on the rights of petitioner and the core principles of

the legal profession is one of the elements in the totality of the proceedings below that rendered them fundamentally unfair and unconstitutional.

CONCLUSION

For the reasons stated, the writ should be granted.

Respectfully submitted,

Arthur R. Block
Counsel of Record
for Petitioner
250 West 57th Street
Suite 317
New York, NY 10019
(212) 956-5550

Of Counsel
Arthur R. Block
Michael A. Hardy
Lawrence A. Grigsby

September 10, 1992

APPENDIX

S025090

84-0-12333

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN THE MATTER OF ALVAADER FRAZIER ON DISCIPLINE

Petition for writ of review denied.

It is ordered that Alvaader Frazier be suspended from the practice of law for a period of five years, that execution of suspension be stayed, and

the she be placed on probation for a period of five years on condition that she be actually suspended for three years and until she makes restitution to Evelyn Allen in the amount of $3,881.60, plus interest at the rate of 10% per annum from March 1, 1984, and furnishes satisfactory proof thereof to the Probation Department of the State Bar Court and until she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. She is also ordered to comply with the other conditions of probation recommended by the Review Department of the State Bar court in its opinion filed October 19, 1991, as modified by its order filed

January 9, 1992. It is further ordered that she take and pass the Professional Responsibility Examination during the period of her actual suspension. (See Segretti v. State Bar (1976) 15 Cal.3d 878, fn. 8.) She is further ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar.

See Business and Professions Code section 6126, subdivision (c).

/s/ Malcolm Lucas
Chief Justice

[stamped]
Supreme Court

Filed
June 15, 1992
Robert Wandruff Clerk
Deputy

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of ALVAADER FRAZIER A Member of the State Bar	**No. 84-O-12333** **OPINION ON REVIEW**

Respondent Alvaader Frazier was admitted to practice in December 1982. The amended notice to show cause[1] charged respondent with seven counts of misconduct, dating from November 1983 until May 1985. After hearing, the referee concluded that respondent (1)

---

[1]The Examiner originally filed a thirteen-count notice against respondent. On April 6, 1989, the examiner moved to dismiss six counts of the original notice and amend the notice to add two additional allegations of misconduct to renumbered count three [Mary Peterson]. Respondent opposed the amendment to add the additional charges. Leave to amend the notice was granted by order dated April 19, 1989. Respondent's challenge on review to the amendment is discussed infra.

abandoned seven clients (rule 2-111(A)(2))[2]; (2) failed to return unearned fees to one additional client as well as to four of the six abandoned clients (rule 2-111(A)(3)); (3) failed to perform legal services competently for seven clients, with no legal work performed for five of the clients (rule 6-101(A)(2)); (4) committed acts of moral turpitude and dishonesty (Bus. & Prof. Code, §6106)[3] by: misappropriating § 6881.60 in escrow funds by means of a fabricated bankruptcy order, misappropriating unearned client fees totalling $10,976, giving two checks written on a closed trust account to two

---

[2] Unless noted otherwise, all further references to rules are to the Rules of Professional Conduct effective between January 1, 1975 and May 26, 1989.

[3] Unless noted otherwise, all further references to sections or codes are to be Business and Professions Code.

different clients, obtaining $500 from a client under false pretenses, and representing two different clients that lawsuits had been filed on their behalf when they had not; (5) failed to return advanced costs and other client funds to which three clients were entitled (rule 8-101(b)(4)); (6) failed to deposit client funds in a trust account (rule 8-101(A)), and (7) in all six cases of misconduct willfully accepted employment for which she had not the time, skill and resources to perform with competence (rule 6-101) (b)(2)).

In mitigation, respondent submitted testimony from her psychotherapist who had treated her for deep depression after respondent had left California and moved to New York. She testified as to respondent's recovery. Respondent also submitted numerous letters attesting to

her character and activities on behalf of low income clients and political causes. Proof was adduced that respondent had made settlements with most complainants, albeit after the institution of bar proceedings against her. The hearing referee concluded that the nature of the misconduct found coupled with aggravating factors, such as respondent's past suspension for non-payment of fees, her failure to cooperate at the hearing, and bad faith toward and harm to her former clients, outweighed the mitigating factors. Under the standards for attorney discipline, the referee concluded that disbarment was warranted.

Respondent filed this request for review. Although respondent's contest is largely a procedural or due process attack on the decision, she also urges

lack of a factual basis for disciplinary findings regarding two clients. She also claims her answer to one count of the amended notice to show cause should not have been stricken as a sanction for her refusal to testify in the State Bar hearing.

With the exception of our determination that the referee erred in striking respondent's answer, we have found that none of respondent's procedural claims warrant relief. However, on our independent review of the record, we find fewer acts of misconduct than determined by the referee and greater mitigating evidence than he found in the form of emotional and psychological difficulties suffered by respondent. Nevertheless, we find respondent culpable of serious misconduct, commencing just over one

year after her admission, including five instances of abandoning or withdrawing from cases without protecting the clients' causes of action; failing to perform legal services competently and failing to communicate with the clients in those five cases; failing to return promptly unearned fees in four of those cases; making misleading statements to two clients; failing to deposit $6,881.60 from the bankruptcy estate of a client in her trust account and later misappropriating the trust funds; and accepting legal employment in these matters without having sufficient time, resources or ability to perform the necessary work with competence. We find this misconduct to warrant serious discipline, but given respondent's mitigating and rehabilitative evidence, we do not conclude, as did the referee,

that disbarment is required. The protection of the public interest and the profession will be served in this matter by a five year suspension stayed on conditions of three years actual suspension and until restitution and rehabilitation are proven as well as placement on a period of supervised probation on terms outlined at the conclusion of this opinion.

I. PROCEDURAL ISSUES

Since much of respondent's attack on the hearing referee's decision focuses on procedural issues, we discuss them first.

A. MOTION TO AUGMENT THE RECORD

First we address respondent's request to augment the record before us to include the decision, order, transcript and declarations filed in In the

Matter of Alvaader Frazier, case no. 90-TE-14293, a proceeding to consider enrolling respondent involuntarily as an inactive member of the bar pursuant to section 6007 (c) (hereinafter "6007 proceeding"). That proceeding was started after the filing of the hearing referee's decision which is before us on review. Respondent claims that the 6007 proceeding record bears on the issues of her affirmative defenses and showing of mitigation, is related to the underlying disciplinary action and that for the record to be complete and to serve the interests of justice, all relevant decisions, specifically the 6007 proceeding and its record, should be before us.

In opposing respondent's position, the examiner disputes that the disposition of the 6007 proceedings is

in any way related to the underlying disciplinary recommendation. She notes the issues in a proceeding for inactive enrollment are different from a disciplinary case and, later in her argument, that unlike a disciplinary hearing, the formal rules of evidence are not in force. She argues that what respondent is actually seeking is to present additional evidence. As such, under rule 562 of the Transitional Rules of Procedure of the State Bar, respondent must show, under penalty of perjury, why such evidence was not presented at the time of the hearing. To illustrate, she notes two cases, Weber v. State Bar (1988) 47 Cal.3d 492 and In re Naney (1990) 51 Cal.3d 186, where motions had been granted to present additional evidence after the hearing decision had been rendered,

where the evidence consisted of aggravating circumstances which occurred after the hearing. Finally, the examiner outlines her objections to specific exhibits sought to be admitted by respondent. (OTC brief in opposition, pp. 4-11.)

Rule 1304 of the Provisional Rules of Practice of the State Bar Court provides that augmentation requests will be granted only if it is found that "the original record is incomplete or incorrect". This follows the Supreme Court policy of only relying on evidence presented to the trier of fact. (In re Rivas (1989) 49 Cal.3d 794, 801.) Such out-of-court evidence ordinarily involves hearsay and offers no means to test the credibility of the declarant. (Ibid.) "Such evidence is virtually impossible to evaluate in the absence of

cross-examination and, to the extent it consists of opinions about the [respondent's] mental attitude, is often based on his own self-serving, out-of-court statements". (Lydon v. State Bar (1988) 45 Cal.3d 1181, 1187.) The only general exception the Supreme Court has recognized to its steadfast rule of refusing to entertain evidence not heard by the State Bar Court is for limited (i.e., documentary) evidence of subsequent rehabilitation when it is the only means to meet a heavy burden to demonstrate recovery from substance addiction or a mental disorder. (Hawes v. State Bar (1990) 51 Cal.3d 587, 596.

Section 6007 proceedings are not proceedings related to disciplinary actions such that consolidation of the cases is mandated. In fact, disciplinary and 6007 proceedings may be

conducted on simultaneous, parallel case tracks. (Cf. Ballard v. State Bar (1983) 35 Cal.3d 274, 288 [where attorney was competent to assist in his defense, and with both disciplinary and 6007 proceedings filed, the State Bar would have to conduct parallel proceedings].) We do take judicial notice of the existence of the 6007 proceeding and the resulting decision therein finding that respondent had rebutted the presumption from the disbarment recommendation that respondent's conduct posed a continuing substantial threat of harm to the interest of her clients or the public. However, as the Supreme Court noted in Conway v. State Bar (1989) 47 Cal.3d 1107, 1119, "Neither the involuntary inactive enrollment order itself nor any of the findings made in those

proceedings is binding or has any probative value in the formal disciplinary case." (Court's footnote 6 omitted.) We recognize that although no involuntary inactive enrollment order was made in this case, the principle nevertheless remains the same. Here, the proffered evidence is not offered to "correct" any omission in the record developed below. Therefore, we find that respondent has not demonstrated that the record must be augmented to correct or complete the hearing record.

We could also construe respondent's motion as seeking to admit additional evidence under rule 562, of the Rules of Procedure of the State Bar. The rule requires the movant to offer by affidavit or declaration, the substance of the new evidence and demonstrate good cause why the proffered evidence was not

previously presented. (Rules Proc. of State Bar, rule 562.)[4] Respondent does not summarize the substance of the evidence sought to be added from the 6007 proceeding and quotes a mere sentence fragment from the 23-page decision resolving the 6007 proceeding. There is no claim that the witnesses or the affiants were unavailable to present their evidence on rehabilitation at the disciplinary hearing or that the substance of their testimony concerns events or observations which post-date the hearing. Reverend Al Sharpton was the only witness in the 6007 proceeding who did not offer some form of evidence

---

[4] Since this hearing began prior to the commencement of hearings by the present State Bar Court, the hearing referee applied the rules of procedure effective prior to September 1, 1989. (Trans. Rules Proc. of State Bar, rule 109.)

(report or character letter) at the disciplinary hearing. We find that respondent has not demonstrated good cause to admit this additional evidence not submitted to the hearing referee. Accordingly, we deny her request.

B. DUE PROCESS OBJECTIONS

Respondent asserts that on a variety of grounds she was denied a fair hearing in the State Bar Court. Her objections fall into two general categories which claim that she was denied a fair hearing because of: (1) adverse rulings prior to trial which assertedly curtailed or prevented discovery to support respondent's affirmative defenses; thereby allowing an amendment of the notice to show cause by the examiner, which respondent contended was prejudicial, and which

resulted in the denial of respondent's request of a three referee panel, and (2) the conduct of the hearing by the hearing referee, during which, according to respondent, the referee's bias and prejudice against respondent and her counsel were manifest and his rulings on admissibility of evidence and testimony constituted prejudicial error.

1. Pre-trial rulings

The issues concerning discovery were raised prior to trial and the rulings reviewed by the discovery review referee. (Rules Proc. of State Bar, rule 324.) Respondent propounded a series of interrogatories concerning the gender, race and practice of members of the State Bar, particularly those members who had been disciplined by the Supreme Court in the recent past, and

sought statistical and other information she contended was held by the State Bar. In response, the examiner provided what documents she had in connection with the allegations in the complaint, as well as information from the California Lawyer periodical and statistical compilations of cases resolved by the State Bar Court by type of discipline imposed. The examiner did not provide any information concerning the race, gender or practice of members of the California bar, representing that such information was not gathered or maintained by the State Bar's membership records and to secure it would require a survey of the entire membership of the bar, which she was not required to do to satisfy respondent's discovery demand pursuant to Code of Civil Procedure section 2030(f)(2). The hearing referee did not find the State

Bar's position to be unreasonable and denied respondent's motion to compel discovery.

The denial of respondent's motion to compel discovery does not demonstrate a denial of due process. Had the information sought been maintained by the State Bar, then respondent's motion to compel would have carried more weight. Given that the information sought was not in the possession and control of the State Bar, respondent's restrictions in developing her affirmative defenses on these grounds were limited not by the State Bar but by her own resources. Respondent's claim of bias is highly generalized and such broad claims have been rejected previously. (Cf. In re Utz (1989) 48 Cal.3d 468, 477-478.)

Respondent objected at the hearing and at the time of a proposed amendment to the notice to show cause to the added charges of misconduct related to a check issued against insufficient funds (hereafter, "NSF check") and alleged solicitation of one Mary Peterson by respondent. The motion to amend the notice was filed on April 6, 1989 and granted on April 19, 1989. Respondent alleged unfair surprise in that she did not have enough time to prepare a defense to the added changes, resulting in a violation of due process. The examiner averred in her supporting declaration to her motion to file the amended notice that she had advised counsel for respondent of the additional charges in December 1988 during the exchange of informal discovery. Both the hearing referee and the discovery

review referee concluded that there was sufficient advance warning to respondent of the additional misconduct allegations to enable her to adequately prepare to meet the additional charges. We agree.

A notice to show cause may be amended, including amending to conform to proof at the hearing so long as the attorney is given a reasonable opportunity to defend the charge (Rose v. State Bar (1989) 49 Cal.3d 646, 654, citing Gendron v. State Bar (1983) 35 Cal.3d 409, 420) and providing that the amendment is not a trap for the unwary respondent who has already introduced evidence to defend a different theory of charges. (In re Ruffalo (1968) 390 U.S. 544, 550-551.) Considering the informal notice to respondent almost five months before the amendment was filed and the one month formal notice given prior to

trial, respondent was accorded adequate time to prepare her defense. (See Marquette v. State Bar (1988) 44 Cal.3d 253, 264-265 [new allegations arose in testimony on first day of hearing; notice was amended a week later; and attorney given one week to file answer and a continuance of more than one month to prepare defense; no due process violation found].) Therefore, we do not find a due process violation regarding the additional allegations in the amended notice to show cause.

Respondent is not entitled to a three-member panel as a matter of due process. (In re Utz, supra, 48 Cal.3d. 468, 477-478; In re Demergian (1989) 48 Cal.3d 284, 292-293.) It was evident from the pre-trial proceedings that the hearing would take more than one day of trial and the request for a three-member

panel was denied on that basis. (Order denying three-member panel dated March 30, 1989.) Given the estimated length of the hearing, the State Bar Court had no discretion to assign the matter to a three-member panel. (Bus. & Prof. Code, § 6079 (b); In re Demergian, supra, 48 Cal.3d 284, 293.) In any event, this review panel of three judges has conducted an independent examination of the record. (Rule 453, Rules of Proc. of State Bar.)

2. Conduct of the hearing

Respondent filed numerous motions to disqualify the hearing referee based upon her assertion under rule 230, Rules of Procedure of the State Bar, that a reasonable person might question the impartiality of the hearing referee because of his personal bias or

prejudice concerning respondent and her counsel.[5] This disqualification standard is drawn from Code of Civil Procedure section 170.1(a)(6)(C) and we agree with the (then) State Bar Court Assistant Presiding Referee's approach in looking to caselaw interpreting this portion of section 170.1 to resolve the issue in his decision dismissing respondent's motion. The applicable standard articulated in United Farm Workers of America v. Superior Court (1985) 170 Cal.App.3d 97, 104, looks to "whether a reasonable member of the

---

[5] The pertinent portion of rule 230 reads as follows: "A referee shall be disqualified if: . . .(3) a person aware of the facts might reasonably entertain a doubt that the referee is biased or prejudiced against the examiner, respondent or respondent's attorney, provided, however, that such a challenge must be supported by a verified showing of the facts supporting this inference." (Rule 230, Rules Proc. of State Bar.)

public at large, aware of all the facts, might fairly question the Court's impartiality". The Assistant Presiding Referee concluded that there was no doubt as to the hearing referee's impartiality at that stage in the proceedings and that his rulings were within the limits of his discretion. Our review of the record affords no basis to differ with that assessment.

The assigned hearing judge or referee is entitled to exert reasonable control over the conduct of proceedings. (See Dixon v. State Bar (1982) 32 Cal.3d 728, 736.) Requiring one counsel to question a witness from beginning to end, asking that respondent not speak to her attorneys while the hearing referee is addressing counsel and expecting that counsel will note their objections for the record and move forward with the

hearing are not unreasonable standards for courtroom behavior, do not deprive respondent of the statutory recognition of legal assistance during her disciplinary hearing (See Bus. & Prof. Code, § 6085 (b)) and do not, without more, constitute bias on the referee's part.

We reject as without merit two additional claims by respondent of bias allegedly committed by the hearing referee. In attempting to complete the mitigation portion of the hearing after a number of continuances to accommodate the litigation schedules of respondent and her counsel, the hearing referee wrote to a New York judge who was presiding over a criminal jury trial in which both respondent and one of her counsel were appearing on behalf of the criminal defendant. The criminal trial

dates conflicted with hearing dates scheduled in the State Bar Court. In correspondence which was not originally provided the parties, the hearing referee accurately advised the New York judge of the nature and status of the public California disciplinary proceedings and asked if the jury trial could be accommodated in some way. (Exh. AA.) The New York judge responded that his trial schedule could not be altered (exh. BB), and later referred in court to the hearing referee's letter to respondent and her counsel in an appearance involving the criminal case after which the parties obtained copies. While the better way may have been for the hearing referee to advise counsel on both sides of his intent to contact the New York judge and copy them on his correspondence, his conduct does not

establish an appearance to a reasonable person of bias constituting a denial of due process. Attempting to coordinate conflicting trial dates is not improper in and of itself and there is no evidence in the contents of the referee's communications that showed bias against the respondent.

The other claimed instance of bias was the hearing referee's recommendation to the Office of Trial Counsel to investigate the conduct of respondent's two New York counsel for possible disciplinary misconduct and to recommend to the State Bar Court that the pro hac vice admission of both counsel be revoked. (See Cal. Rules of Court, rule 983.) The hearing referee was careful to refer these determinations to other bodies for final determination. Because of his referral, he is not in the same

position as a trial judge ruling on a contempt citation and we find inapplicable respondent's citation to U.S. Supreme Court decisions in contempt cases.

3. Expert witness testimony

Respondent claims that she was entitled to present psychiatric testimony during the culpability phase of the hearing. Unless respondent was asserting a defense of insanity to the misconduct charges (see Newton v. State Bar (1983) 33 Cal.3d 480), or claiming inability to assist in her own defense (see Slaten v. State Bar (1988) 46 Cal.3d 48, 53-57), which she was not, testimony as to psychological disorders related to the misconduct constitutes at most evidence in mitigation of the discipline to be imposed. (Porter v.

State Bar (1990) 52 Cal.3d 518; Silva-Vidor v. State Bar (1989) 49 Cal.3d 1071; In re Lamb (1989) 49 Cal.3d 239.) The hearing referee's determination that such evidence be presented only after a finding of culpability is consistent with the law and did not deny respondent a fair hearing.

II. FACTS

The factual summary presents the counts in the order of the amended notice to show cause, with the exception of the Brumback matter, count five, which will be discussed separately. Unless otherwise noted, these factual findings and conclusions of law are drawn from the referee's decision, are supported by the record and we concur in them. When we disagree with the sufficiency of the evidence for a

finding or conclusion by the referee or where there is a substantial issue raised by the parties, a more thorough examination of the issue will be presented.

A. COUNT ONE (JACKSON-DAY)

Respondent was hired on March 22, 1983, by Rogernald Jackson, a retired scientist from the U.S. Department of Agriculture, and William Day, a college chemistry professor, to represent them in a civil lawsuit. Each paid $1,000 in advanced attorneys fees and agreed that respondent's time would be billed at a rate of $75.00 an hour. On August 29, 1983, respondent filed suit against two named defendants and up to 1,000 "Doe" defendants to be named later, and was able to serve one of the named defendants. Thereafter, respondent

asked for an additional $500 from each of her clients on December 26, 1983, in order to file an answer to a cross-complaint. She was paid upon request and filed the answer to the cross-complaint on behalf of Day and Jackson on January 31, 1984. Upon request of her clients, respondent prepared an accounting of her time dated December 20, 1983. Day and Jackson were unable to contact respondent thereafter despite numerous requests to her for additional information through telephone calls and letters. Jackson and Day hired new counsel on March 18, 1986, and new counsel sent respondent a substitution of attorney form and letter requesting the client file on March 18, 1986. Receiving no answer from respondent, the new counsel was forced to file a motion

to discharge respondent and substitute himself as new counsel.

In 1989, respondent paid Jackson and Day $1500 each in exchange for releasing all claims against respondent. The releases are dated March 31, 1989 (Jackson) and May 10, 1989 (Day).

The hearing referee found that respondent had willfully violated rule 2-111(A)(2) in that she had withdrawn from employment without taking reasonable steps to avoid prejudice to her clients, failed to perform legal services competently, contrary to rule 6-101(A)(2) and failed to communicate with her client or ignored her client's needs, contrary to section 6068 (a).[6]

---

[6] In each client matter, the hearing referee concluded that respondent had committed willful violations of sections 6103 and 6068 (a). The Supreme Court held in Baker v. State Bar (1989) 49 Cal.3d 804, 815, and (continued...)

Particularly given respondent's failure to cooperate with subsequent counsel, her failure to respond to pointed letters from her clients and her total

---

[6](...continued)
numerous cases thereafter that section 6103 "does not define a duty or obligation of an attorney, but provides only that violation of his oath and duties defined elsewhere is a ground for discipline". Accordingly, we do not find any culpability on that basis. As to section 6068 (a), it appears to have been "appended to each conclusion that an act of moral turpitude or a violation of the Rules of Professional Conduct had occurred. As in Baker, we fail to see how [respondent's] alleged misconduct constitutes a violation of section 6068 (a)". (Lipson v. State Bar (1991) 53 Cal.3d 1010, 1016.) However where, as in this count, we find a failure to communicate or an inattention to client needs which predates the adoption of section 6068 (m) (see Baker, supra, 49 Cal.3d at pp. 814-815), the pre-section 6068 (m) doctrine underlying this duty remains a viable ground of discipline as a violation of section 6068 (a). (Layton v. State Bar (1991) 50 Cal.3d 889, 903-904; In the Matter of Lilley (State Bar Ct. May 1, 1991, No. 87-O-16728 [91 L.A. Daily Journal Daily App. Rep. 6874, 6877; 91 Recorder Cal. Daily Opn. Service 4572, 4575].)

inaction after filing the answer to the cross complaint, these conclusions are well grounded in the record.

The referee made no finding on the charge that respondent had failed to return unearned fees to her clients as required under rule 2-111(A)(3). We find that in light of respondent's accounting for her time dated December 20, 1983 and her subsequent filing of an answer to the cross complaint, the charge that she retained fees which she did not earn is unsupported in the record.

B. COUNT TWO (VAZ)

Respondent was retained on a contingency fee basis by Toni Vaz to file and prosecute a civil lawsuit on her behalf against a retail store for assault and battery (personal injury).

The retainer agreement was signed on April 25, 1984, and Ms. Vaz paid respondent $300 in advance costs in three payments, the last one on June 5, 1984.[7] Ms. Vaz testified that she was unable to reach respondent after that date by telephone and, after leaving numerous telephone messages, finally visited respondent's office, where she learned that respondent had moved without leaving a forwarding address. Examination of court records by the State Bar investigator did not disclose any lawsuit filed on behalf of Ms. Vaz against the retail store.

---

[7] The hearing referee found that on a later unspecified date the respondent represented that she had filed a lawsuit on behalf of Ms. Vaz seeking $1,000,000 in damages. There is no support for this finding in either Ms. Vaz's testimony at the hearing nor in the documents submitted relating to this count. Therefore, we do not adopt this finding.

Respondent repaid $300 to Ms. Vaz by letter from her attorney dated November 25, 1988.

In this review, respondent has not disputed the facts found by the referee in this count. The hearing referee concluded, and we agree, that respondent failed to perform legal services competently, contrary to rule 6-101(A)(2). He also found that respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice, in violation of rule 2-111(A)(2). Based on the referee's findings supported by the record showing that respondent failed to return Vaz's phone calls, we also adopt the referee's conclusion that respondent breached her duty to communicate with her client, contrary to section 6068 (a). (See ante, footnote 6.)

We cannot concur with the referee's conclusion that respondent's failure to return unearned costs promptly constituted a violation of rule 2-111(A)(3). (Decision, p. 7.) As the Supreme Court noted in Read v. State Bar (1991) 53 Cal.3d 394, 410, advances for payments of expenses incurred during representation are outside the scope of rule 2-111(A)(3), which deals with the refunding of unearned legal fees.

The referee did not address in his conclusions of law the State Bar's charges in this count that respondent violated rule 8-101(B)(4) and section 6106. We do not find that respondent's failure to return unearned costs violated rule 8-101(B)(4) without evidence, as required by the rule's terms, that Vaz requested return of the monies. (Chefsky v. State Bar (1984) 36

Cal.3d 116, 126-127.) Although no lawsuit was filed on Vaz's behalf and Vaz was entitled to refund of these monies without having to wait four and a half years, we do not find that respondent's inaction alone supports a finding that she misappropriated those costs or that her failures constituted acts of moral turpitude under section 6106.

C. COUNT THREE (PETERSON)

Mary Peterson was initially hired by respondent to move her offices from 2716 South Western Avenue to 2822 South Western Avenue, both addresses in Los Angeles. In payment, respondent gave Peterson a check dated December 31, 1984, drawn on her client trust account for $126.37. The check was returned to Peterson stamped "account closed".

Peterson testified that after reaching respondent by telephone, respondent promised her that she would make the check good, but never did. Respondent disputes the referee's finding that respondent was aware that the trust account was closed at the time she gave Peterson the check. We agree that the record is not clear on this point, given the limited bank records that were offered by the State Bar. However, respondent gave a trust account check to pay for a personal expense and, after her bank refused to honor the check, did not meet her financial obligation represented by the NSF check, and thus committed an act of moral turpitude. (Cannon v. State Bar (1990) 51 Cal.3d 1103, 1113-1114.)

After her early 1985 telephone conversation with respondent, Peterson

met with respondent to seek respondent's help in two matters: a worker's compensation claim and an action to recover her home. Peterson signed a retainer agreement on February 25, 1985, advanced respondent $600 in fees on that date and paid respondent an additional $900 in fees by April 15, 1985. Respondent met with Peterson in early May 1985 and advised her that respondent would be meeting shortly with one of the parties that would conceivably be a defendant in the real estate action. Peterson never heard from or saw respondent after that meeting. Her phone messages to respondent were not returned and office visits were unavailing. No work was done on the worker's compensation matter and no lawsuit was filed on the real estate dispute; the latter is now pending

litigation filed by Peterson's subsequent legal counsel.

Peterson received a $1500 refund from respondent on or about November 25, 1988, but respondent did not return or preserve Peterson's file or other documents entrusted to her.

The hearing referee concluded, and we agree, that respondent had abandoned her client, contrary to rule 2-111(A)(2); that her refund of the advanced unearned attorneys fees was not prompt, contrary to rule 211-(A)(3); and that in failing to take any action on the workers compensation matter or to file any action on behalf of Peterson on the real estate matter, respondent failed to perform legal services competently, contrary to rule 6-101(A)(2). In addition, we find, as the referee did implicitly, that

respondent's violation of section 6068 (a) resulted from the breach of her duty to communicate with her client. (See ante, p. 17)

The referee also found that respondent had committed acts of moral turpitude and dishonesty by supplying an NSF trust account check to pay for her office move contrary to section 6106 (see ante) and by misappropriating $1500 in advanced fees. We have already concluded that respondent's tendering of the NSF check and subsequent disregard of the underlying debt to Peterson constituted an act of moral turpitude. However, after reviewing Supreme Court decisions dealing with the retention of unearned advance fees, we do not find a basis in the case law to support the proposition that an attorney's failure to return promptly unearned fees

constitutes an act of moral turpitude encompassed by section 6106. Given that the retention of unearned fees is a violation of an express duty under rule 211-(A)(3) (now rule 3-700(D)(2)), we need not make a duplicative finding of culpability for the same misconduct under section 6106. (Bates v. State Bar (1990) 51 Cal.3d 1056, 1060).

D. COUNT FOUR (BUTLER)

Charlotte Butler retained respondent on September 3, 1984, to file a civil suit for damages on her behalf. At her initial consultation with respondent, Butler paid $150 in advance attorney fees. Another $150 was paid to respondent on September 21, 1984, to, in the words of Butler, "file the lawsuit". Two additional payments of $150 each were made in November 1984, with

respondent representing to Butler each time that the lawsuit was filed and pending court action. Butler's last payment to respondent was in March, 1985, for a total of $750 in advanced fees. Butler was unable to contact respondent after March 1985 despite numerous telephone calls and finally visited respondent's office, where she was advised that respondent had left without a forwarding address or telephone number. A State Bar investigator testified that no lawsuit on behalf of Butler was on file in Los Angeles Superior Court.

Respondent gave Butler a check on or about November 25, 1988 for $750, representing the monies advanced by Butler.

Respondent has not disputed the referee's findings and conclusions. We

concur with the hearing referee's conclusions that respondent's failure to perform services and departure without providing her client with a forwarding address, telephone number, or her file breached rule 2-111(A)(2) as an abandonment of Butler without protecting her rights; respondent's failure to return fees advanced by Butler until November 1988 violated rule 2-111(A)(3), and her misrepresentations as to the status of the lawsuit to Butler constituted an act of moral turpitude under section 6106. The referee concluded that respondent's acts generally violated section 6068 (a). We limit that finding solely to respondent's failure to communicate with Butler. Consistent with our analysis under count three, we do not find, as did the referee, that respondent's

lengthy retention of unearned fees was an act of dishonesty, corruption or moral turpitude contrary to section 6106.

E. COUNT SIX (ALLEN)

Respondent was retained by Evelyn Allen on November 16, 1983, to represent Allen in her Chapter 11 bankruptcy proceeding concerning her board and care facility for mentally disabled adults. Allen's prior counsel, William Tookey, had filed the initial petition and all other papers up to respondent's substitution of counsel form filed with the bankruptcy court on November 30, 1983. Allen paid respondent $300 in advanced fees at her initial meeting with respondent and $500 more on November 29, 1983.

Allen's real estate holdings were listed in her bankruptcy filings and as such were subject to the jurisdiction of the court. (11 U.S.C. § 525.) Allen's creditors filed their claims with the bankruptcy court and would be paid under a court and creditor-approved plan from assets in the estate. (11 U.S.C. §§ 1123, 1129.) Other than in the ordinary course of business with approval of the bankruptcy judge, Allen, as debtor in possession, could only sell or lease her property after a notice and hearing. (11 U.S.C. § 363 (b).) During this time, the bankruptcy judge assigned to the Allen case was John Bergener.[8]

Allen learned from a real estate agent that her house in Altadena was being sold. She contacted respondent,

---

[8] The matter was later transferred to Bankruptcy Judge Geraldine Mund. (Exh. 32.)

who asked for the name of the escrow agent and advised Allen that she (respondent) would send a courier to the escrow office to obtain the balance of the funds from the sale and convey those monies to the bankruptcy court. Closing on the property occurred on December 23, 1983. Copies of two checks made payable to respondent, representing the balance of funds from the sale totaling $6,881.60, were in the file obtained from the escrow company and showed that the checks were deposited by respondent in her bank account on or about December 23, 1983 ($6,385.93) and March 27, 1984 ($485.67). The escrow file also contained an order dated December 6, 1983, allegedly from the bankruptcy court, referring to a "Petition For Sale of Property Outside of the Ordinary Course of Business." The terms of the

order authorized the sale of Allen's Altadena property, with the net funds to be delivered to the respondent's trust account pending further order of the bankruptcy court. The order was on respondent's letterhead, bore a date and entered stamp for December 6, 1983, and was stamped at the end of the order with the name "William J. Lasarow."[9]

The complete bankruptcy file does not contain nor does the accompanying docket sheet note the petition for the sale of the property or the order authorizing the sale. There are no additional proceedings directing the disbursal of the net funds from the sale evident in the file or docket sheet. Allen testified that she did not receive

---

[9] At the time alleged in this count, Judge Lasarow was the presiding judge of the U.S. Bankruptcy Court for the Central District of California.

any funds in connection with the sale, nor could she contact respondent after March 1984. The only filing respondent made in bankruptcy court on behalf of Allen which is reflected in the bankruptcy file or docket sheet was her November 30, 1983 substitution.

The hearing referee concluded on this evidence that the bankruptcy order was fraudulent and that respondent misappropriated the funds owed to the bankruptcy estate. Respondent's willful violation of rule 8-101(B)(4) has been demonstrated by her failure to pay the funds as directed by the bankruptcy court. The funds can be traced to respondent's hands from the copies of the checks in the escrow file. Since then, the funds themselves have never been accounted for. Respondent was responsible for depositing them in a

trust account pursuant to rule 8-101(A)[10] and under the terms of the bankruptcy order authorizing the sale. We concur with the hearing referee that this evidence supports a finding of misappropriation (see Greenbaum v. State Bar (1987), 43 Cal.3d 543, 550) and constitutes an act of moral turpitude and dishonesty as well. (Bus. & Prof.

---

[10] Copies of two checks made payable to respondent, representing the balance of funds from the sale totaling $6881.60, were in the file obtained from the escrow company. The first check negotiated on December 23, 1983, was not deposited in the trust account respondent maintained at West Olympia Bank. (Exh. 34). The back of the second check, negotiated on March 27, 1984, has written "4 X 20[;] 4 X 100[;] 1 X 5" which corresponds to the $485 amount of the check. In addition, respondent's California driver's license number and credit card number from the May Company appear on the check, consistent with a finding that respondent cashed the check. We conclude, as did the referee, that respondent did not deposit either check in her trust account as required by rule 8-101(A).

Code § 6106; McKnight v. State Bar (1991) 53 Cal.3d 1025, 1033-1034.) The record also supports the findings that respondent failed to communicate with Allen, thereafter abandoned her, and failed to perform legal services competently. These findings justify the conclusion that respondent willfully violated section 6068 (a), and rules 2-111(A)(2) and 6-101(A)(2).

Respondent's statement to Allen that she would arrange for a courier to deliver the proceeds of the sale to the bankruptcy court was an act of dishonesty and moral turpitude contrary to section 6106 as well. Ordinarily, failure to keep a promise of future action is not by itself proof of dishonesty. (Tenzer v. Superscope (1985) 39 Cal.3d 18, 30-31.) The Supreme Court dismissed an argument

based on the Tenzer dicta in an attorney discipline case where the record revealed misconduct beyond mere nonperformance. (Bowles v. State Bar (1989) 48 Cal.3d 100, 109 [issuance of a bad client trust account check, attorney's subsequent failure to make good on the check and failure to promptly forward client funds awarded in an arbitration together support finding of moral turpitude.]) In this case, respondent's reassurance to her client that the funds would be remitted to the court was followed shortly thereafter by respondent's misappropriation of those same funds. Given these circumstances, we agree with the hearing referee that respondent's actions were intended to mislead her client and constituted deceitful conduct, contrary to section 6106.

We do not find clear and convincing evidence that respondent forged the bankruptcy order to authorize the sale. In an attorney discipline proceeding, all reasonable doubts must be weighed in favor of the accused attorney. (Kapelus v. State Bar (1987) 44 Cal.3d 179, 183.) While the evidence presented only from the documents raises an inference of irregularity, without evidence from the bankruptcy court attesting to its practices and evaluating the genuineness vel non of respondent's order purportedly signed by a judge other than the assigned judge, we cannot conclude that clear and convincing evidence exists to find respondent culpable of fabricating a court order in this matter.

F. COUNT SEVEN (RULE 6-101(B)(2))

The hearing referee concluded based on the evidence in six of respondent's cases in which she abandoned clients and their causes, retained unearned fees, passed at least one bad check, and misrepresented to clients the status of their cases that respondent repeatedly accepted employment and continued representation when she reasonably should have known she did not have nor would acquire time to perform, sufficient time, resources and ability to perform in violation of rule 6-101(B)(2). The hearing referee focused his discussion on respondent's mental state and whether she had the requisite willfulness to violate the rule. The definition of willfulness for a Rule of Professional Conduct violation is one often repeated by the Supreme Court. The attorney must simply have acted or

omitted to act purposely to do the act forbidden by the rule or not to do the act required by the rule. (McKnight v. State Bar, supra, 53 Cal.3d 1025, 1034; Beery v. State Bar (1987) 43 Cal.3d 802, 815.) There is no evidence that respondent was incapable of forming the requisite purpose or intent. We adopt the referee's finding that respondent was capable of the willfulness necessary to violate rule 6-101(B)(2).

There are a few cases that address the elements of rule 6-101(B)(2), which became effective in October 1983. The one case with some discussion of the rule is Garlow v. State Bar (1988) 44 Cal.3d 689. In Garlow, the attorney was charged with three matters of professional misconduct. As to one client matter, the Supreme Court found that the attorney had failed to

communicate with and abandoned the client, failed to provide competent legal services and failed to refund the unearned fee, along with falsely testifying that he had been fired by the client. His abandonment of the client without performing any work for her led the Court to conclude that Garlow had violated 6-101(B)(2) "because of his willingness to accept employment when he should have known he was not in the position to competently represent his client". (Id. at p. 706.) The fact that Garlow handled a large number of cases only bolstered the conclusion that he had accepted employment in this instance with insufficient resources to competently act on the client's behalf. (Id. at p. 711.) Given the evidence presented in at least four client matters establishing that respondent

accepted employment and then abandoned her clients' causes with little or no work done and unearned fees retained, a violation of rule 6-101(B)(2) has been abundantly demonstrated on this record.

G. COUNT FIVE (BRUMBACK)

1. Striking of answer and admission of allegations

On this count, the hearing referee made numerous factual and culpability findings concerning the alleged complaint of a now deceased client, Virginia Brumback, based on evidence admitted into the record after respondent refused to testify when called by the State Bar in connection with this count of alleged misconduct.

On the third day of trial (May 10, 1989), respondent was called as an adverse witness by the State Bar as part

of its case on culpability on the Brumback allegations. (Evid. Code, § 776.) Respondent had neither been served with a subpoena nor a notice in lieu of subpoena by the State Bar. On advice of counsel, respondent refused to be sworn or testify. In response to respondent's refusal to take the stand, the hearing referee conditionally struck respondent's answer to the amended complaint on this count and deemed the allegations admitted. (Order filed May 10, 1989; decision at p. 14, para. 45.) Respondent never testified during the proceeding.

We see three primary questions raised by the facts: (1) was respondent properly called to the witness stand to testify as an adverse witness for the State Bar; (2) did she have the right to refuse to testify, and (3) if she had to

testify, whether the referee was empowered to enter her default for her refusal to testify?

Attorney discipline proceedings are sui generis, neither criminal nor civil, and ordinary criminal procedural safeguards do not apply. (Yokozeki v. State Bar (1974) 11 Cal.3d 436, 447.) The proceedings are conducted pursuant to the Rules of Procedure adopted by the State Bar, and the rules of evidence in civil cases in courts of record are generally followed. (Rule 556, Rules Proc. of State Bar.[11]) The California

---

[11] Rule 556 reads in its entirety: Except as provided in hearings authorized by rule 555 [default hearings], and subject to relevant decisions of the Supreme Court, the rules of evidence in civil cases in courts of record in this state shall be generally followed in a formal proceeding, but no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error or

(continued...)

Supreme Court has noted that the procedural safeguards contained within the Rules of Procedure are adequate to assure procedural due process. (Van Sloten v. State Bar (1989) 48 Cal.3d 921, 928.)

Governing law and the Rules of Procedure provide that parties may compel the attendance of witnesses by subpoena. (Rules of Proc. of State Bar, rule 310(b); Bus. & Prof. Code § 6049 (c); Code Civ. Proc., § 1985.) At the time of the hearings, respondent was not a resident of California and thus was not amenable to service of a subpoena prior to the hearing. (See Code Civ. Proc., § 1989.) Since respondent is a party, the State Bar could have provided her California counsel with a notice in

---

[11] (...continued)
errors complained of resulted in the denial of a fair hearing.

lieu of subpoena to require respondent's attendance as a witness at the disciplinary proceeding. (Code Civ. Proc., § 1987 (c); see also Rules Proc. of State Bar, rule 555(b)[12].)

Respondent contends in her post argument brief[13] that the Rules of

---

[12] When a member fails to appear at a disciplinary or probation revocation hearing, after the notice to show cause and the notice of hearing were properly served, a default may be entered against the member. The charges in the notice may be deemed established without further proof if and only if the member was subpoenaed to appear or was served with a notice to appear as a witness. (Rule 555(b), Rules Proc. of State Bar.)

[13] After oral argument, we requested that the parties submit briefs in response to the following inquiry:

> Whether sections 177 and 1990 of the Code of Civil Procedure or any other provisions of California law apply to this State Bar proceeding to authorize the trial referee in this matter to have directed that Respondent, present in the courtroom but not under

(continued...)

Procedure provide that respondent can only be compelled to appear as a witness if subpoenaed and to permit otherwise would abrogate the protection accorded by the subpoena process. She argues that the rules specified in our proceedings are not rules of evidence incorporated by rule 556 of the Rules of Procedure. In her view, the intent of rule 556 is to include by reference purely procedural mechanisms for conducting hearings. Code of Civil Procedure sections 177[14] and 1990[15]

---

[13] (...continued)
subpoena or notice to appear, be called as a witness? If the answer is in the affirmative, under what authority did the referee have the power to sanction Respondent in the manner in which the sanction occurred?

[14] Code of Civil Procedure section 177 reads as follows:

(continued...)

confer judicial powers on a "judicial officer" or "court", and referees are neither. To apply either section through rule 556 would be too broad a

---

[14] (...continued)

Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of official duty;
2. To compel obedience to his lawful orders as provided in this code;
3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code;
4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

[15] Code of Civil Procedure section 1990 states: "A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer."

reading of the powers of the State Bar Court and therefore ultra vires.

The State Bar replies that it had the right to call respondent as an adverse witness under Evidence Code section 776, and that sections 177 and 1990 of the Code of Civil Procedure constitute additional support for its position. Evidence Code section 776 permits the State Bar to call respondent as a witness and examine her as if under cross-examination at any time during its presentation of evidence. The examiner finds no authority for the assertion that under Evidence Code section 776, a witness must first be subpoenaed. She also notes that respondent is obligated to appear at the disciplinary proceeding. (Morales v. State Bar (1988) 44 Cal.3d. 1037, 1046.)

"The process by which the attendance of a witness is required is the subpoena." (Code Civ. Proc., § 1985 (a); Witkin, Cal. Evidence (3d ed. 1986) Witnesses, § 1036.) In the case of a party, the alternative process is notice to the party's attorney. (Code Civ. Proc., § 1987 (b); Witkin, Cal. Evidence (3d ed. 1986) Witnesses, § 1047.) Evidence Code section 776 alone does not empower the examiner with the authority to require respondent's presence at the hearing. Once the hearing commences the State Bar is entitled to call respondent to the witness stand as part of its presentation of evidence to prove its case.

Notwithstanding the fact that respondent was neither subpoenaed nor noticed to appear at the disciplinary hearing, she does have the obligation to

be present. (Martin v. State Bar (1991) 52 Cal.3d 1055, 1063; Yokozeki v. State Bar, supra, 11 Cal.3d 436, 447.) She was in fact in attendance for most of the proceedings.

We find the application of section 1990 of the Code of Civil Procedure appropriate in this case. Section 1990 is found in Part IV of that Code [Miscellaneous Provisions], and is also part of Title III entitled "Production of Evidence". Rule 556 of the Rules of Procedure of the State Bar is not limited solely to incorporating the Evidence Code. That rule encompasses "the rules of evidence in civil cases in courts of record in this state". The law applied in civil cases includes the Evidence Code, applicable sections of the Code of Civil Procedure and judicial decisions. Proceedings before the State

Bar are sui generis, neither civil nor criminal in nature. (Brotsky v. State Bar (1962) 57 Cal.2d 287, 301.) The State Bar Court, in disciplinary matters, acts as the administrative arm of the Supreme Court. (Lebbos v. State Bar (1991) 53 Cal.3d 37, 47; Herron v. State Bar (1931) 212 Cal. 196, 199.) Disciplinary proceedings under the prior volunteer system were characterized by our Supreme Court as "in essence the initial stage of an action in court" with the State Bar acting as a fact finder or referee for the Supreme Court. (Brotsky v. State Bar, supra (1962) 57 Cal.2d 287, 300.) Attorney disciplinary hearing panels were also recognized as composed of "judicial officers" within the ambit of section 6068 (d).[16]

---

[16] Under section 6068 (d), an attorney has the duty to

(continued...)

(Franklin v. State Bar (1986) 41 Cal.3d 700, 709; Olguin v. State Bar (1980) 28 Cal.3d 195, 200.) We find that the hearing referee was functioning as a "judicial officer" in this disciplinary proceeding. Therefore, the referee had the authority to compel respondent, present in his hearing room, to be a witness under Code of Civil Procedure section 1990.

No person may be compelled to take the witness stand and be a witness at his or her own criminal trial. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) A witness may assert the privilege in any proceeding so as not to give answers which would subject him or

---

[16] (...continued)
"employ . . . such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Emphasis added.)

her to criminal prosecution. (Malloy v. Hogan (1964) 378 U.S. 1.) An attorney may not be disciplined solely based on invoking the Fifth Amendment privilege against self-incrimination. (Spevack v. Klein (1967) 385 U.S. 511.)

However, an attorney disciplinary matter is not a criminal case for purposes of the Fifth Amendment, so an attorney may be called as a witness at his or her own disciplinary hearing (Black v. State Bar (1972) 7 Cal.3d 676, 686) and immunized testimony may be used. (Segretti v. State Bar (1976) 15 Cal.3d 878, 887.) While respondent could have been required to take the witness stand when properly called, she could have declined to answer specific questions when asked by asserting her Fifth Amendment right to protection from criminal liability. (Black v. State

Bar, supra, 7 Cal.3d 676, 688.) No adverse inference can be drawn from a respondent's invocation of the Fifth Amendment's protection. (Evid. Code., § 913, subd. (a); cf. Sands v. State Bar (1989) 49 Cal.3d 919, 928, 930.)

Respondent never took the stand and disobeyed the referee's proper order to testify. She invoked the Fifth Amendment through counsel without specific questions having been addressed to her. Her actions were not warranted; and, had she been under subpoena, she could have been certified to the Superior Court for contempt proceedings. (Bus. & Prof. Code, § 6050.)

The referee could also have considered respondent's conduct to be an aggravating factor in the event culpability had been found. (Rules Proc. of State Bar, div. V, Stds. for

Atty. Sanctions for Prof. Misconduct std. 1.2 (b)(vi) (hereafter "Stds".) However, even the examiner concedes that the hearing referee did not have the direct power of contempt (Bus. & Prof. Code, § 6051) nor could he exercise the authority to strike respondent's answer and deem the allegations at issue to have been admitted by default as a matter of law. Those latter remedies were not available as sanctions in the discovery phase of the proceeding (rule 321, Rules Proc. of State Bar); and, in our view, the referee had no authority to invoke them as a sanction for failure to testify at the hearing. Therefore, we disagree with the referee's striking of respondent's answer to count five of the notice to show cause and find instead that respondent has not admitted the allegations therein.

2. Heresay nature of evidence presented

In her answer, respondent denied every allegation in count five, including the allegation of an attorney-client relationship. The only witnesses presented by the State Bar as to this count were its investigators David T. Fritz and Tim Biagas. Fritz testified that he was assigned to investigate a complaint filed by a Virginia Brumback against respondent. He wrote Brumback a letter and received a handwritten response on the same sheet of paper. (Exhibit 10.) Fritz's portion of Exhibit 10 is admissible as a business record, having been prepared in the ordinary course of his employment with the State Bar. (Evid. Code, § 1271(a).) Biagas testified that he had done a

court records search and that no civil actions had ever been filed by respondent on Brumback's behalf. As noted, Brumback was deceased at the time of the hearings below.

The remainder of the documentary evidence, including a retainer agreement, the complaint filed with the State Bar, and documents accompanying the complaint were all written by Brumback. The referee found that the Brumback statements in exhibits 10 and 11 fit within three exceptions to the hearsay rule: (1) as adoptive admissions of the respondent; (2) for the limited purpose of showing Brumback's state of mind; and (3) as "[c]orroborated heresay under the decisional exception for hearsay corroborated by non-hearsay evidence, i.e., Exhibits 12, 13a, 13b and 13c

(Evidence Code section 1200(b); PG&E v. Thomas Drayage and Rigging Co. (1968) 69 C 2d 33)". (Decision, pp. 16-17.)

The hand-written complaint and its accompanying documents remain heresay as out-of-court statements of a now deceased declarant. (Evid. Code, § 1200.) None of the exceptions to the hearsay rule concerning deceased declarants apply under these facts. (See Evid. Code, §§ 1242 [dying declarations]; 1227 [wrongful death action]; 1261 [action against decedent's estate].) The complaint form could be admitted for the limited use of showing the state of mind of Brumback; i.e., to show Brumback believed she had a complaint against respondent which she desired to bring to the attention of the State Bar by filing a complaint, and only where her state of mind is at issue

in the case. (Evid. Code, § 1251.) The truth and substance of the complaint are not in evidence, however, under this exception to the hearsay rule. (Evid. Code, § 1251 (b).) Moreover, Brumback's state of mind is not an element in the charged violations; it is respondent's state of mind which is at issue.

Brumback's letter to respondent (exhibit 13a) could have been admitted as an adoptive admission, as proposed by the referee under Bowles v. State Bar, supra, 48 Cal.3d 100, 108, if Brumback had testified. In Bowles, the client's mother testified that she had written to Bowles accusing him of failing to communicate or perform services for the client, her daughter. Because Bowles had failed to respond, the witness' testimony was admissible as an adoptive admission. (Id. at p. 108.) Had

Brumback been available to testify that she did not receive a response to the letter, as did the complaining witness in the Bowles case, her testimony and, conceivably the letter memorializing her act, would have been admissible. Without some admissible evidence, such as testimony, that there had been words or other conduct manifesting respondent's adoption of the statement, the letter alone is not an adoptive admission under Evidence Code section 1221.

Evidence Code section 1200 (b) states that hearsay evidence is inadmissible except as provided by law, thereby recognizing exceptions created by caselaw as well as statute. Pacific Gas & E. Co. v. G. W. Thomas Drayage, Etc. Co. (1968) 69 Cal.2d 33 (hereafter Pacific Gas & E. Co.) created the

corroborative evidence exception to the hearsay rule. (Jefferson, Synopsis of Cal. Evidence (1985) The Hearsay Rule, § 1.3, pp. 16-17.) The Pacific Gas & E. Co. case involved, in part, the admissibility of invoices, bills and receipts to prove the amount of damages plaintiffs sustained. The Court found the documents to be hearsay and thus unusable as proof of liability, payment for the repairs or the reasonableness of the charges. (Pacific Gas & E. Co., supra at 42-43.) The Court noted, "If, however a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony". (Id. at p. 43.) There was testimony in the Pacific Gas & E. Co. record that the invoices had been paid, so that the invoices

could be admitted for the limited purpose of corroborating that testimony.

Admission of the documents to corroborate independent testimony is a limited hearsay exception, similar in effect to the "state of mind" exception. The Court in Pacific Gas & E. Co. further ruled that the documents admitted to corroborate a party's testimony could not be used to prove that the actual repairs had been made. Expert testimony on the reasonableness of the charges for the repair work, which was based on the individual items listed on the invoices, was therefore inadmissible. (See, e.g., People v. Maki (1985) 39 Cal.3d 707, 711-712 [admission of a hearsay document as an adoptive admission, "not merely as corroboration," requires additional

evidence of knowledge by the party against which it is sought].)

California courts have invoked this hearsay exception to sustain the admission of invoices from a packing house after the manager of the cattle company testified to receiving them and arranging for payment (Imperial Cattle Co. v. Imperial Irrigation Dist. (1985) 167 Cal.App.3d 263, 272); of dental bills and the reasonableness of the charges, where the plaintiff/patient testified as to the services received, his receipt of the bill and his payment (McAllister v. George (1977) 73 Cal.App.3d 258, 263); and of doctor bills and the reasonableness of the charges therein, where the plaintiff/patients first identified each bill, testified as to what each charge was for and the amount of each which had

been paid. (Rodgers v. Kemper Constr. Co. (1975) 50 Cal.App.3d 608, 626.) We have found no cases authorizing the use of otherwise hearsay documents to corroborate admissible evidence other than testimony.

The admissibility of the Brumback complaint, attached documents and response to the State Bar investigator's inquiry were argued to be "corroborated hearsay". This misstates this narrow decisional exception to the hearsay rule. The hearsay evidence must corroborate admissible evidence, generally testimony, already in that record, not the other way around. Therefore, under the "corroborating hearsay rule," the Brumback complaint was sought to be admitted for the truth of the matters asserted therein for the purpose of corroborating exhibits 12

(retainer agreement) and 13a (April 12, 1985 letter from Brumback to respondent), 13b (copy of check from respondent's trust account) and 13c (back of 13b). However, these exhibits could not properly be admitted into evidence because those documents are themselves hearsay, and do not fall within one of the hearsay exceptions.

We are then left with the testimony of the two investigators, the evidence of Brumback's intent to file a complaint against respondent and the Fritz letter seeking information from Brumback concerning a returned check for $17,500 written on the respondent's trust account. Based on this record, we cannot find there is clear and convincing evidence of misconduct alleged in this count.

EVIDENCE IN MITIGATION AND AGGRAVATION

Circumstances in mitigation or aggravation must be established by clear and convincing evidence. (Stds. 1.2(b) and (e); Rose v. State Bar, supra, (1989) 49 Cal.3d 646, 667.) We consider the evidence in aggravation and mitigation in turn.

A. ACTS IN AGGRAVATION

The referee identified several aggravating factors which he found were established by clear and convincing evidence. These include respondent's suspension between August 5, 1985 and October 16, 1986, for non-payment of fees, her "contemptuous" attitude toward her misconduct and the disciplinary proceedings, and her failure to cooperate with the State Bar. In the referee's view, respondent's misconduct

constituted multiple acts of wrongdoing, involved bad faith and concealment, and reflected a pattern in which respondent failed to communicate with her clients, did not perform legal services on their behalf and eventually abandoned them. The misconduct he found included misappropriation of client trust funds and advanced fees, totalling over $10,000, and acts of moral turpitude and bad faith in addition to the theft of funds. (Decision, pp. 46-47; 49.) Overall he concluded the misconduct resulted in harm to her clients, the public and the administration of justice. (Decision, p. 47.) The referee also found that respondent lacked candor toward her clients and the State Bar during the pendency of the discipline proceedings. (Decision, p. 49.)

The hearing referee found that respondent's 14-month suspension for failure to pay bar dues constituted prior discipline. (Decision, p. 46.) The Supreme Court has, in some cases, referred to any attorney's suspension for non-payment of State Bar membership fees as "prior discipline". (Phillips v. State Bar (1989) 49 Cal.3d 944, 950; Farnham v. State Bar (1976) 17 Cal.3d 602, 608; Demain v. State Bar (1970) 3 Cal.3d 381, 383. However, in other cases of attorneys previously suspended for nonpayment of fees, the Supreme Court declined to treat those prior suspensions as part of a record of prior discipline. (Hitchcock v. State Bar (1989) 48 Cal.3d 690, 701, 708; Bate v. State Bar (1983) 34 Cal.3d 920, 922.) Given that the suspension for non-payment of fees arises solely from that

administrative fact (§ 6143) and not from any finding of misconduct, we believe that the Court's treatment in Hitchcock and Bate is the appropriate one and we therefore decline to consider respondent's administrative suspension for failure to pay bar fees to be a prior record of discipline for purposes of weighing the appropriate discipline in this case. However, we do not find her lack of prior discipline to be a factor in mitigation in light of the evidence that her misconduct began just over one year after her admission to practice. (Amante v. State Bar (1990) 50 Cal.3d 247, 256.)

We find that the record establishes that respondent failed to cooperate with the State Bar insofar as she failed to keep her address current with membership records so that much of the State Bar's

investigation was delayed and stymied. We will not impute any aggravating effect to respondent's failure to take the stand when properly called (see discussion ante) in that she was following the advice of her counsel on that issue and the law was not clear at the time. Nor, in assessing her cooperation with the State Bar in this case, will we attribute to respondent the courtroom behavior and rhetorical fervor of her counsel.

We do not find respondent to have demonstrated insight into her misconduct. Her failure to pay restitution until well after she was financially able to do so and only under the pressure of these proceedings weakens her claim to rehabilitation. (Read v. State Bar, supra, 53 Cal.3d 394, 426.) Moreover, she has made no

restitution, according to the record, in the Allen matter of the $6,881.60 she misappropriated. She misrepresented the status of the lawsuit to Butler and misled Allen as to the supposed deposit of the net proceeds from the house sale with the bankruptcy court. Such acts of bad faith and concealment toward her clients are aggravating factors. (Std. 1.2(b)(iii) and (b)(vi).) Respondent's assertion that it was the State Bar's duty to contact her clients and safeguard her client files when she left her California clients suddenly, ignores her responsibilities to communicate with her clients, safeguard their interests and protect their confidences. (See, e.g., Read v. State Bar, supra, 53 Cal.3d 394, 426 [attorney's belief that it was the State Bar's duty to contact her clients and develop a restitution

plan illustrated lack of insight into misconduct and questionable rehabilitation].) Those obligations are imposed on all attorneys admitted to practice in California and respondent cannot shift them to the State Bar.[17]

Respondent's wrongdoing involved multiple acts of misconduct (std. 1.2(b)(ii), and resulted in harm to respondent's clients. (Std. 1.2(b)(iv).) Day, Jackson and Peterson incurred costly delays and required additional proceedings by subsequent counsel in pursuing their lawsuits. Vaz and Butler lost their causes of action altogether as a result of respondent's inaction and abandonment. The misappropriation in

---

[17] In the limited circumstances where an attorney is shown to be incapacitated, the State Bar may then seek an order from the Superior Court for the court to assume jurisdiction over the law practice. (Bus. & Prof. Code, §§ 6180, 6190, 6190.1, et seq.)

the Allen case resulted in a loss to Allen's bankrupt estate, and consequently to her creditors of almost $7,000, but we cannot conclude that respondent's inadequate legal assistance caused the conversion of Allen's Chapter 11 proceeding to a Chapter 7 action.

B. FACTS IN MITIGATION

Respondent's case in mitigation concentrated on her emotional distress and disability, her recovery from her emotional problems, and her subsequent activities on behalf of the underrepresented, primarily in New York City. Her evidence of emotional disability consisted of the testimony of Bette Braun, the psychotherapist who co-led respondent's group therapy sessions from November 1985 until March 1987, and her treatment summary of respondent

prepared in June 1989, prior to her testimony. To formulate her summary, Ms. Braun relied in part on treatment summaries written by Lenora Fulani, Ph.D., and Fred Newman, Ph.D.,[18] also prepared in preparation for respondent's disciplinary hearing.[19] Respondent was treated by Dr. Fulani from June 1985, soon after her arrival in New York from Los Angeles, until September 1985. She then had a few individual sessions with Dr. Newman and joined the group therapy sessions with Ms. Braun and Dr. Newman.

---

[18] Dr. Fulani practiced under the supervision of Ms. Braun. Dr. Newman is the founder of the social therapy approach to psychotherapy and practices in New York in partnership with Ms. Braun.

[19] The summaries by Drs. Fulani and Newman were admitted into evidence (exhs. P and Q) for the limited purpose of indicating the source of information for Ms. Braun in making her diagnostic assessment of respondent, and not for the truth of the statements therein.

Ms. Braun testified that in her view, respondent arrived from California suffering from a deep depression, triggered when respondent's seventeen year old son ran away from his mother's home in 1984 and threatened to kill himself if respondent attempted to force him to return.[20] She identified respondent's state as "crisis paralysis," an immobilizing condition characterized by feelings of inadequacy, self-destruction and self-blame resulting from the racism in American society. In the view of Braun, professional people of color are susceptible to this emotional illness.

---

[20] The son had been the focus of a two-year custody fight during respondent's college and law school education between respondent and an elderly couple who had kidnapped the boy from respondent at an early age. Respondent also suffered from other traumatic events which occurred during her adolescence.

Social therapy helps such patients overcome the condition by teaching them to avoid self-blame for the racism in society, relinquish the role as victim and instills confidence in their ability to change society.

After her initial crisis was resolved, respondent became involved in community-based free legal clinics in Harlem and other minority communities in New York City. She has also been very active in the AIDS Bill of Rights and human rights struggles in Haiti and elsewhere. Twenty letters attesting to her community and human rights activities were admitted in evidence. About a third of the letters made no reference to the disciplinary charges against respondent. Of those which evidenced some familiarity with the charges, a few simply stated that they

were aware that respondent's misconduct occurred around the time she closed her practice in California. The remainder indicated that they had been told that respondent had been found culpable of abandoning clients and mishandling client funds prior to June 1985. Most character references asserted that any unethical conduct by respondent would be aberrational in light of their experience with respondent. Two letters questioned the motives of the State Bar in proceeding against respondent.

In rebuttal, the examiner presented testimony from Robert Pasnau, M.D., director of Adult Psychiatric Clinical Services and Professor of Psychiatry at the University of California's Los Angeles campus. Dr. Pasnau's testimony dealt solely with the treatment summaries of respondent prepared by

respondent's New York therapists. Dr. Pasnau's criticism focused on the failure to conduct a physical examination or other diagnostic tests of respondent, failure to verify or attempt to corroborate any of the family or background history provided by respondent with other sources, the lack of any notation or consideration of a personality or character disorder which respondent's file might suggest and the limited diagnostic evaluations made. In his view, the reports reviewed and relied upon by Braun did not encompass the period of respondent's misconduct in California and failed to address the bearing, if any, her mental state had on her law practice. Dr. Pasnau was not familiar with the "crisis paralysis" condition and did not find a definition

or description of it after consulting a number of psychiatric treatises.

The referee concluded that there was not clear and convincing evidence in the record that respondent suffered from extreme emotional distress nor sufficient proof that what difficulties she experienced played a significant role in her misconduct. (Decision, pp. 43-44.) He discounted her character references because they were in the form of declarations and because he did not find that the declarants were fully conversant with the disciplinary charges against respondent. (Weller v. State Bar (1989) 49 Cal.3d 670, 677.)

The Supreme Court has recognized that "extreme emotional difficulties are a mitigating factor where 'expert testimony establishes [that the difficulties were] directly responsible

for the misconduct; . . . provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties.'" (Porter v. State Bar (1990) 52 Cal.3d 518, 527, quoting std. 1.2(e)(iv).) Aberrational conduct resulting from extremely stressful family circumstances can also be considered emotional stress warranting mitigation of discipline. (Friedman v. State Bar (1990) 50 Cal.3d 235, 245; In re Demergian, supra, 48 Cal.3d 284, 294.). The expert testimony must establish more than the impairment of the attorney's judgment or distortion of values caused by stress generally; there must be evidence that the emotional difficulties caused the misconduct. (In re Naney, supra, 51 Cal.3d 186, 197.) There must be clear and convincing proof

of the attorney's complete and sustained recovery such that further misconduct is unlikely in the future. (Porter v. State Bar, supra, 52 Cal.3d 518, 528; In re Lamb, supra, 49 Cal.3d 239, 246.) Absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (Kaplan v. State Bar (1991) 52 Cal.3d 1067, 1072-1073; In re Naney, supra, 51 Cal.3d 186, 197.)

We disagree with the referee's conclusion that no weight should be accorded the testimony regarding respondent's psychological problems. The shortcomings of Ms. Braun's analysis as identified by Dr. Pasnau do not negate her observations that respondent was in a state of depression and distress when she joined Newman and Braun's therapy sessions in New York in late 1985. Her conclusion that

respondent, after a year and a half of therapy, conquered her psychological problems and developed coping mechanisms for dealing with any future challenges, carries convincing weight as well. The critical issue is the relationship, if any, between these family and psychological problems and respondent's misconduct. Many of the acts of misconduct predate the departure of respondent's son in 1984. Since the son's running away from home was the triggering event in respondent's emotional crisis, ethical violations arising prior to this time cannot be traced to these problems. (See, e.g., Read v. State Bar, supra, 53 Cal.3d 394, 424-425 [family and emotional problems which overwhelmed attorney in February 1984 do not mitigate misconduct which occurred prior to that date].) We do

not find sufficient evidence in the record relating respondent's emotional and psychological problems to the most serious misconduct found, namely the misappropriation of the proceeds of the Allen property sale totaling approximately $6,900, and the misleading information given to her clients concerning the status of their cases.

Acute depression and other psychological problems can explain, but not excuse, inattention to the demands of a law practice and the ethical improprieties that result. (Silva-Vidor v. State Bar, supra, 49 Cal.3d 1071, 1078-1079; Frazier v. State Bar (1987) 43 Cal.3d 564, 577-578.) Therefore, to the degree that her emotional problems underlay respondent's failure to provide competent legal services, to apprise her clients of significant developments in

their cases and to protect them and their rights from prejudice when she closed her law office and left California, evidence of her recovery from and unlikely recurrence of these ailments is mitigating. (Hawes v. State Bar, supra, 51 Cal.3d 587, 595; In re Naney, supra, 51 Cal.3d 186, 197.)

Respondent refunded monies to settle with five of her six clients, but did not restore the funds until after the Notice to Show Cause had been filed in this matter, and, in the case of Messrs. Day and Jackson, the settlements were not reached until shortly before the start of the disciplinary hearing in May 1989. Respondent's restitution to her former clients has little significance as a factor in mitigation, since the payments were prompted by the institution of disciplinary proceedings

against her. (Rosenthal v. State Bar (1987) 43 Cal.3d 658, 664.) Her misconduct began soon after she was admitted to practice, thus the lack of any prior record of discipline is not a factor in mitigation. (See discussion ante; Amante v. State Bar, supra, 50 Cal.3d 247, 256.) Nor is her inexperience a factor to be weighed; where the misconduct involves misappropriation, inexperience is an irrelevant consideration. (Id. at p. 254.) The lack of any misconduct charges against respondent since her move to New York is not compelling, in our view. Respondent has removed herself from California clients and is performing legal services only in New York on a limited basis on pro hac vice admission. Misconduct allegations arising in New York would not

necessarily be reported to discipline authorities in California.

Respondent's attorneys' characterization of respondent's practice in California as one servicing poor and underrepresented persons is not established by convincing evidence in this proceeding. We know that among the clients who were abandoned by respondent in the matters before this court was the owner of a board and care facility (Allen), an employee of a moving company which provided services for respondent (Peterson), a college professor (Day) and a federal government scientist (Jackson). Even if respondent's California practice did serve people of limited or no means, they are entitled to able, responsive and trustworthy counsel from the attorney they hired. Representing those of limited means does

not excuse improper or unethical conduct. (Jones v. State Bar (1989) 49 Cal.3d 273, 289.)

APPROPRIATE LEVEL OF DISCIPLINE

The hearing referee recommended that respondent be disbarred, in light of the findings of willful misappropriation of substantial funds and acts of moral turpitude toward clients, without substantial mitigation, and under standards 2.2(a) [willful misappropriation of entrusted funds] and 2.3(a) [offenses involving moral turpitude]. The examiner concurs in that judgment. Respondent maintains that the matter should be dismissed but contends in a footnote in her brief that should culpability be found on any of the counts, no actual suspension be

imposed and respondent be permitted to continue in practice.

The purpose of attorney discipline proceedings is not to punish the attorney but rather to protect the public, preserve public confidence in the legal profession and maintain the highest possible standards for the profession. (Chadwick v. State Bar (1989) 49 Cal.3d 103, 111; std. 1.3.) The standards are guidelines (In re Young (1989) 49 Cal.3d 257, 268) and any recommended discipline should be consistent with prior Supreme Court caselaw as well. (Snyder v. State Bar (1990) 49 Cal.3d 1302, 1310-1311.)

There have been a number of recent cases which have dealt with claims of emotional problems underlying and mitigating serious attorney misconduct. In Silva-Vidor v. State Bar, supra, 49

Cal.3d 1071, the attorney stipulated to misconduct affecting 14 clients, involving numerous instances in which she abandoned clients, failed to provide competent legal services, failed to refund or account for unearned fees and misappropriated $760 in client funds. Most of her misconduct took place in a two-year period and demonstrated a common pattern of willful misconduct. (Id. at pp. 1077-1078.) During this same period, Silva-Vidor was beset with a series of emotional problems, beginning with a severe depression, an unstable relationship with her drug-abusing husband, the break-up of her marriage after her husband was diagnosed with a brain tumor, and one automobile and two slip-and-fall accidents resulting in serious injury to the attorney, and adding to her depression.

She also had a difficult pregnancy which required bed rest for the final four months and her daughter was born with cerebral palsy. She sought help from a licensed clinical social worker to overcome her debilitating depression, became employed as a legal services attorney, and volunteered her services to three organizations helping the underrepresented. She cooperated fully with the State Bar, stipulating to facts and discipline in her disciplinary proceeding, and offered remorse and restitution to her former clients. The Court found that the evidence demonstrated personal difficulties for which her inattention to her practice was not condoned but understood. It imposed a five year suspension, stayed, with a five-year probation period and one year actual suspension.

In In re Naney, supra, 51 Cal.3d 186, the Supreme Court considered and rejected evidence of emotional and fiscal problems as mitigating circumstances. Naney had been convicted of three counts of grand theft for misappropriating $17,950 in client trust funds over a period of less than one year. During this same period, Naney had increasing marital problems resulting in separation from his wife and children, for which he sought the help of a psychologist, and suffered financial difficulties. Noting that the misappropriations occurred after two years of weekly therapy, the Court concluded that his emotional problems stemming from his marital difficulties were either not directly responsible for his misappropriations or that his problems were so deep seated as to

negate any showing of rehabilitation. (Id. at p. 197.) The Court disbarred Naney.

The mitigating evidence presented in Porter v. State Bar, supra, 52 Cal.3d 518, involved "stresses far in excess of those usually associated with a dissolution" (id. at p. 528) and were coupled with the theft of his client files and his eviction from his home and office, all occurring between 1983 and 1985. The bulk of Porter's misconduct, to which he stipulated, took place during that same time and involved abandonment of clients, failure to provide competent legal services, retention of unearned fees and multiple acts of moral turpitude, including misappropriating over $14,500 in trust funds. Porter also practiced law while suspended for non-payment of fees. He

demonstrated an outstanding record of community involvement and service both prior and subsequent to his misconduct. (Id. at pp. 524-526.) Porter sought psychological treatment for his emotional difficulties beginning in 1987 and his psychoanalyst concluded at the hearing that Porter was fully recovered. (Id. at pp. 525-526.) Balancing the seriousness of his misconduct against his evidence in mitigation, the Court imposed a five year suspension, stayed, five years on probation and a two year actual suspension.

The most recent case of emotional and psychological disability involving a number of matters of misconduct is Read v. State Bar, supra, 53 Cal.3d 394. In that case the attorney engaged in 13 instances of misconduct, involving multiple acts of bad faith, dishonesty,

misappropriation of entrusted funds, concealment and misrepresentations to the court, abandonment of clients and, at one point, counselling a client to perjure herself. Read did not provide restitution to her clients until shortly before her disciplinary case was heard, although she had the financial resources to do so earlier. (Id. at pp. 424-425.) In mitigation, Read emphasized her severe emotional and financial problems stemming from the breakdown of her marriage and the criminal conduct of one of her sons, who was abusing drugs. These events resulted in the financial ruin of her family and law practice, and threw Read into a deep depression. (Id. at p. 424.) However, the Court concluded that not all of Read's misconduct could be traced to these difficulties and although she may have

recovered her psychological health, she had not sufficiently established her rehabilitation or demonstrated recognition and acceptance for her serious misdeeds. (Id. at p. 425.) The Court ordered that she be disbarred.

The Supreme Court has considered cases involving multiple abandonments of clients or abandonment of clients coupled with other serious misconduct to warrant significant discipline, even when the attorney has no prior record of discipline. However, Read v. State Bar is the only recent one where the Court found it necessary to disbar the attorney to protect the public's interest. In Borre v. State Bar (1991) 52 Cal.3d 1047, the attorney abandoned the appeal of an incarcerated client and fabricated evidence to support his lies to the contrary before the State Bar

during its investigation and at the hearing. The Court found the "fraudulent and contrived misrepresentations to the State Bar" to be more egregious conduct than the serious matter of the abandonment of the incarcerated client. (Id. at 1053.) However, the Court concluded that a five-year suspension, stayed, a five-year probationary term and a two year actual suspension recommended by the State Bar Court was sufficient under the facts. The Court in Bledsoe v. State Bar (1991) 52 Cal.3d 1074, found that four instances of client abandonment (one involving misrepresentations to the client and two cases where Bledsoe failed to return unearned fees), coupled with a finding that Bledsoe did not cooperate with the State Bar, did not merit the attorney's disbarment, as

recommended by the State Bar Court. The Court did not find a pattern to the abandonments and gave some mitigating weight to Bledsoe's 17 years in practice. Again, a five-year suspension, stayed, a two-year actual suspension, with a five-year probation term was deemed sufficiently severe discipline for the misconduct found. Finally, in Martin v. State Bar, supra, 52 Cal.3d 1055, the attorney abandoned four clients, making misrepresentations to clients in two cases and improperly retaining a client's personal property in another. He also used an NSF check in a fifth case to pay filing fees. Disbarment was rejected again by the Court, finding that a five-year suspension, stayed and probation reporting for five years, with a two-year actual suspension, was appropriate.

We do not find that disbarment is warranted in this case. The misconduct at issue is neither as extensive as that present in the Read case nor is the case for rehabilitation as weak as in Naney. However, as the Court noted in Porter, "Though we are persuaded by [respondent's] showing of mitigation, we are nonetheless constrained to observe our responsibility to preserve confidence in the legal profession and maintain the highest possible professional standards for attorneys". (Porter v. State Bar, supra, 52 Cal.3d 518, 528.) Respondent commenced her misconduct just over a year after her admission to practice of law, misappropriated a substantial amount of entrusted funds, did not provide competent legal services and took cases when she knew she would be unable to

devote sufficient time and energy to them, did not communicate with her clients and, in some instances misled them as to the status of their cases, finally abandoning her law practice with no notice to her clients. Substantial discipline is warranted.

Therefore, we recommend that respondent be suspended for five years, stayed, with probation for five years on the conditions which include that she actually be suspended for three years and until she has demonstrated her rehabilitation, fitness to practice and learning and ability in the general law to the satisfaction of the State Bar Court pursuant to standard 1.4(c)(ii) and has made restitution to Evelyn Allen. Imposition of the showing of fitness under standard 1.4(c)(ii) is necessary, in our view, to establish

respondent's progress in rehabilitation over the lengthy period of her suspension from the practice of law and to safeguard the public interest in the legal profession and assure the competency of its practitioners. The restitution condition is consistent with the goals of furthering respondent's rehabilitation and the public's confidence in the legal profession. (Sorensen v. State Bar (1991) 52 Cal.3d 1036, 1044.) In light of respondent's current residency in New York and professed intent to remain there for the foreseeable future, we recommend also that respondent be required to pass the multistate professional responsibility examination required of applicants for admission to practice in California, available nationally, rather than the California professional responsibility

examination tailored for members of the California State Bar, and that she do so prior to the end of her actual suspension. Further, we recommend that she be required to comply with rule 955, between;California Rules of Court, and to perform the acts specified within subsections (a) and (c) within 30 and 40 days, respectively after the effective date of the Supreme Court's order in this case.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent Alvaader Frazier be suspended from the practice of law in California for a period of five years, that execution of the suspension order be stayed, and respondent be placed on probation for

five years under the following conditions:

1. That respondent shall be suspended from the practice of law in the State of California during the first three years of said period of probation and until: (a) respondent has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to Standard 1.4 (c)(ii), Standards for Attorney Sanctions for Professional Misconduct, and (b) respondent has made restitution to Evelyn Allen in the sum of $6,881.60 with interest of 10% per annum from March 1984 until paid in full and provided satisfactory evidence of said restitution to the Probation Department, State Bar Court, Los Angeles;

2. That during the period of probation, she shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, she shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, she shall file said report on the due date

next following the due date after said effective date);

(a) in her first report, that she has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that she has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters

set forth in subparagraph (b) thereof;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of her probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning her compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

6. That respondent shall promptly report, and in no event in more than ten days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

7. That if she is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, she shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with her practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account designated as a "trust account" or "clients' funds account" in a bank authorized to do business in the State of California or in conformance with the rules governing trust accounts in the jurisdiction in which respondent is practicing pro hac vice;

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions transactions sufficient to identify the client in whose behalf the

transaction occurred and the date and amount thereof;

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s);

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent

record showing all specifically identified property held in trust for clients;

8. Respondent shall maintain with the Probation Department a current address and a current telephone number at which telephone number respondent can be reached and respond within 12 hours;

9. That respondent shall provide satisfactory evidence of completion of a course on law office management which meets with the approval of the probation monitor within the period of her actual suspension;

10. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

11. That at the expiration of the period of this probation if respondent has complied with the terms of

probation, the order of the Supreme Court suspending from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We further recommend that within the period of actual suspension, respondent be required to take and pass the multistate examination in professional responsibility administered by the National Conference of Bar Examiners and provide proof thereof to the Clerk of the State Bar Court, Los Angeles.

Finally we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date

of the Supreme Court's order in this case.

STOVITZ, J.

We concur:

PEARLMAN, P. J.

NORIAN, J.

Case No. 84-O-12333

In the Matter of

ALVAADER FRAZIER

Hearing Department Referee:

John P. Sparrow,
Judge, Superior
Court, Retired

COUNSEL FOR PARTIES

STATE BAR OF CALIFORNIA:

Dominique Snyder, Esq.
Office of Trial Counsel
333 S. Beaudry Avenue
Ninth Floor
Los Angeles, CA 90017

FOR RESPONDENT:

Lawrence Allen Grigsby, Esq.
2701 West Manchester Blvd.
Englewood, CA 90305
(213) 778-5894

Arthur R. Block, Esq.
250 West 57th St., Ste. 317
New York, NY 10019
(212) 956-5550

Michael A. Hardy, Esq.
250 West 57th St., Ste. 317
New York, NY 10019
(212) 956-5550

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No. 84-0-12333
	)	
ALVAADER FRAZIER	)	ORDER MODIFYING
Member of the	)	OPINION
State Bar	)	
	)	

BY THE DEPARTMENT:

The opinion filed October 10, 1991, is hereby modified as follows:

1) On page 25 of the typed opinion, after the first full paragraph, a new paragraph is inserted to read: "After the initiation of disciplinary proceedings, respondent paid Allen $3,000 in exchange for releasing all claims against respondent".

2) On page 43 of the typed opinion, second full paragraph, the third sentence is changed to read: "Although Allen testified that in November of 1988, she agreed to accept $3,000 from respondent in full

settlement, the record is clear that respondent misappropriated $6,881.60 of Allen's proceeds." Additionally, new fourth and fifth sentences are added: "From at least a moral standpoint, respondent owes Frazier an additional $3,881.50. An attorney may be required to make restitution as a moral obligation even if there is no legal obligation to do so. (Brookman v. State Bar (1933) 45 Cal.3d 1004, 1008.)"

3) On page 50 of the typed opinion, first full paragraph, the first two lines of the paragraph are changed to read: "Respondent refunded monies to settle with five of her six clients and refunded $3,000 of $6,881.60 owed Allen, but did not restore the funds until after the Notice to"

4) On page 57 of the typed opinion, first full paragraph, line

seven of the paragraph is changed to read: "Restitution to Evelyn Allen of $3,881.60 plus interest. Imposition of the showing of fitness"

5) On page 59 of the typed opinion, the first line of the paragraph is changed to read: "Evelyn Allen in the sum of $3,881.60 with interest of 10% per annum".

[stamped]

Filed
January 9, 1992
State Bar Court
Clerk's Office
Los Angeles

Designated for Publication

Public Matter

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	No. 84-0-12333
ALVAADER FRAZIER	**MODIFICATION OF ORDER MODIFYING OPINION**
A Member of the State Bar	

BY THE DEPARTMENT:

The order modifying opinion filed herein on January 9, 1992, is itself ordered modified by changing the fourth sentence to be added on page 43 of the typed opinion to read as follows: "From at least a moral standpoint, respondent owed Allen an additional $3,881.60."

[stamped]

Filed
February 4, 1992
State Bar Court
Clerk's Office

Designated for Publication

Public Matter

AFCACERT.ADD

COUNSEL PRESS
A Division of Ameriscribe Management Services, Inc.
11 EAST 36TH STREET, NEW YORK, NEW YORK 10016
(212) 685-9800; (516) 222-1021; (914) 682-0992; (908) 494-3366

(124084)

(2)

No. 92–448

FILED
OCT 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

ALVAADER FRAZIER,
Petitioner

vs.

STATE BAR OF CALIFORNIA
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DIANE C. YU
RICHARD J. ZANASSI*
DOMINIQUE SNYDER
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

Attorneys for Respondent

*Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner, who has been suspended from the practice of law by the California Supreme Court, articulates an adequate ground for the exercise of this Court's discretionary review by contending that disciplinary proceedings were biased and that she was "selectively prosecuted," where the California State Bar Court and the California Supreme Court have examined and rejected her contentions that attorney disciplinary proceedings were institutionally biased and were conducted in violation of her constitutional rights; and where, in determining that abstention was proper under Younger v. Harris, 401 U.S. 37, 915 S.Ct. 746, 27 L.Ed.2d 669 (1971), both the United States District Court, Central District of California, and the Ninth Circuit Court of Appeals found that petitioner had failed to demonstrate

extraordinary circumstances or proven bias on the part of the State Bar of California which would preclude application of the abstention doctrine.

SUBJECT INDEX

	Pages
QUESTIONS PRESENTED	i-v
I. INTRODUCTION	1-4
II. BACKGROUND	4-21
A. The Nature of the State Bar of California	4-9
B. Statement of Facts	9-21
III. ARGUMENT	22-33
A. Under Rule 10 of the Rules of the Supreme Court of the United States, Petitioner has Failed to Allege Grounds for the Exercise of this Court's Discretionary Review	23-26
B. Petitioner's Claims of Constitutional Violations Have Been Fully Reviewed and Rejected by the Review Department of the State Bar Court and by the California Supreme Court	27-30
C. Both the United States District Court and the Ninth Circuit Court of Appeals Have Held That Petitioner Has Failed to Demonstrate Bias or Discrimination on the Part of the State Bar . .	30-31

SUBJECT INDEX (Cont'd)

PAGES

D. The Fact that Disciplinary Proceedings Before the State Bar Hearing Department Were Conducted Prior to 1989 Procedural Reforms, Provides No Basis for the Granting of Discretionary Review . 31-33

IV. CONCLUSION 33

APPENDIX A UNPUBLISHED DECISION OF U.S. COURT OF APPEALS FOR 9TH CIR. IN FRAZIER v. STATE BAR OF CALIFORNIA, ET AL., NO. 89-55675, D.C. NO. CV 89-2586-WDK, FILED JANUARY 14, 1991

TABLE OF AUTHORITIES

PAGES

Cases

Alberton v. State Bar, 37 Cal.3d 1, 11, 206 Cal.Rptr. 373, 686 P.2d 1177 (1984), cert. den 470 U.S. 1007, 105 S.Ct. 1366, 84 L.Ed.2d 386 (1985) 9

Dove v. United States, 423 U.S. 325, 96 S.Ct. 579, 46 L.Ed.2d 531 (1976) 23

Durham v. United States, 401 U.S. 481, 483, 91 S.Ct. 858, 860 (1971) 23

Emslie v. State Bar, 11 Cal.3d 210, 225 (1974), 113 Cal.Rptr. 175, 520 P.2d 991 . . . 5

Frazier v. State Bar of California, et al., U.S.D.C., Cent. Dist. Cal., No. 89-2586 WDK 11,12

Jacobs v. State Bar, 20 Cal.3d 191, 196, 141 Cal. Rptr. 812, 570 P.2d 1230 (1977) 5

McCray v. State Bar, 28 Cal.3d 257, 272, 211 Cal.Rptr. 691, 696 P.2d 83 (1985) 9

Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed 897 (1955) 24

TABLE OF AUTHORITIES (cont'd)

PAGES

Cases (cont'd)

Younger v. Harris, 401 U.S. 37, 915 S.Ct. 746, 27 L.Ed.2d 669 (1971) 3,12,29,30

Constitutions

California Constitution
Article VI, section 9 4

Rules

California Rules of Court
rule 952(a) 9,29
rule 952(c) 29

Rules of Procedure of the State Bar of California
rule 2.15 6
rule 2.26 6

Rules of the Supreme Court of the United States
rule 10 2,23-25

State Bar Transitional Rules of Procedure
rule 453 27,32

West's Cal. Rules of Court - State (1989 ed.), pp. 867-868 6

TABLE OF AUTHORITIES (cont'd)

PAGES

Statutes

California Business & Professions Code
- section 6000, et seq. 4
- section 6001 4
- section 6044 5
- section 6078 9
- section 6079.1 7
- section 6079.1(e) 8
- section 6081 9
- section 6082 14,28
- section 6083 9,14,28
- section 6083(a) 8
- section 6086.5 5,6,8
- section 6086.65 7
- section 6086.65(d) 9
- section 6086.9 7
- section 6087. 8,9

California Statutes 1986
- chapter 1114, section 6 7

California Statutes 1988
- chapter 1159, section 7 7-8
- chapter 1159, section 11 8
- chapter 1159, section 13 8

3B West's Ann. Bus. & Prof. Code
(1974 ed., 1989 cum. pocket part)
- section 6086.5 6

Miscellaneous

1 Witkin, Cal. Proc. (3d ed. 1985)
- §480, p. 530 5

No. 92-448

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALVAADER FRAZIER,
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I

INTRODUCTION

Respondent, The State Bar of California (hereinafter the "State Bar"), respectfully requests that the Court deny this Petition for Writ of Certiorari seeking review of the California Supreme Court's order denying a petition for review of the recommendations of the

California State Bar Court regarding attorney discipline.

The California Supreme Court, on June 15, 1992, ordered that petitioner be suspended from the practice of law for a period of five years, that execution of suspension be stayed and that petitioner be placed on probation for a period of five years subject to certain conditions, including actual suspension for a period of three years and restitution to one of her former clients. (Petitioner's Appendix 1a-3a.)

As respondent will demonstrate, there are no grounds upon which this Court should exercise review under rule 10 of the Rules of the Supreme Court of the United States (hereinafter "Rule 10"). Petitioner's generalized and unsupported claims of constitutional violations, based on alleged institutional bias and

discriminatory disciplinary proceedings, have been resoundingly rejected by the Review Department of California's State Bar Court and by the California Supreme Court. Moreover, both the United States District Court, Central District of California, and the Ninth Circuit Court of Appeals have abstained from enjoining the disciplinary proceedings under Younger v. Harris, 401 U.S. 37, 915 S.Ct. 746, 27 L.Ed.2d 669 (1971), after finding that petitioner had failed to demonstrate a verified showing of actual on the part of the State Bar.

Thus, petitioner has had ample opportunity to present her constitutional claims of discrimination both during the course of her disciplinary proceedings and in several independent judicial forums. Her contention that the abstention doctrine as enunciated in Younger v.

Harris, supra, 401 U.S. 37, has precluded her from airing her allegations of constitutional violations in an unbiased tribunal, and that this Court should therefore hear her claims, is without merit.

II

BACKGROUND

A. The Nature of the State Bar of California.

The State Bar is a constitutional agency established as a public corporation in the judicial branch of state government. All persons licensed to practice law in California are members of the State Bar. Cal. Const., art. VI, §9; Cal. Bus. & Prof. Code, §6001.

Under California's State Bar Act (Cal. Bus. & Prof. Code, §6000 et seq.), the State Bar, as the California Supreme Court's administrative arm, has statutory

authority to conduct disciplinary proceedings; however, the California Supreme Court retains inherent power to control disciplinary matters. Jacobs v. State Bar, 20 Cal.3d 191, 196, 141 Cal. Rptr. 812, 570 P.2d 1230 (1977).

After enactment of the State Bar Act, Bus. & Prof. Code, §§6000 et seq., disciplinary proceedings were originally conducted by the Board of Governors of the State Bar or by committees appointed by the Board, which committees later became known as "disciplinary boards." Cal. Bus. & Prof. Code, §§6044, 6086.5; Emslie v. State Bar, 11 Cal.3d 210, 225, 113 Cal.Rptr. 175, 520 P.2d 991 (1974). In 1979, State Bar rules established and renamed the disciplinary boards as the State Bar Court. 1 Witkin, Cal. Proc. (3d

ed. 1985), §480, p. 530.[1]

At that time, the State Bar Court consisted of volunteer referees who sat in departments of the State Bar Court. The State Bar Court, both then and now, consists of a Hearing Department, which conducts formal proceedings, and a Review Department, which operates as an appellate body in reviewing determinations of the Hearing Department. Rules Proc. of State Bar, rules 2.15 and 2.26 [West's Cal. Rules of Court - State (1989 ed.), pp. 867-868].

Beginning in 1987, the State Bar Court system, at the direction of the

---

[1] In 1985, California Business and Professions Code section 6086.5 was amended to substitute the phrase "the State Bar Court" for "disciplinary board(s)" throughout the section as a non-substantive change. See Historical Note, 3B West's Ann. Bus. & Prof. Code (1974 ed., 1989 cum. pocket part), §6086.5, p. 154.

Legislature, was subjected to intensive evaluation and review for a four-year period by a Discipline Monitor appointed by the State Attorney General. California Business and Professions Code, section 6086.9, added by statutes of 1986, chapter 1114, section 6.

In 1988, upon recommendation of the Board of Governors of the State Bar and the Disciplinary Monitor, California Business and Professions Code sections 6079.1 and 6086.65 were enacted, providing for appointment by the California Supreme Court of at least six full time hearing judges to the Hearing Department of the State Bar Court and a full time three-member Review Department consisting of a Presiding Judge, Lay Judge, and Review Department Judge to replace its eighteen volunteer members. Cal. Stats. 1988, ch.

1159, §§7, 13.[2]

In September 1989, the "new" State Bar Court system went into effect. However, all actions of the State Bar remain subject to the immediate and plenary review of the California Supreme Court. Cal. Bus. & Prof. Code, §6083, subd. (a) & 6087. The final disciplinary recommendation of the State Bar Court to the California Supreme Court is still that of its Review Department or the Hearing Judge, if no review by the Review Department is sought. Cal. Bus. & Prof.

---

[2] California Business and Professions Code, section 6086.5 was also amended to state that the Board of Governors "shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings. . . ." Cal. Stats. 1988, ch. 1159, §11. In the Hearing Department, the Board of Governors may continue to appoint volunteers and retired judges, now to be called "pro tempore judges" of the Hearing Department, to hear disciplinary matters. Cal. Bus. & Prof. Code, §6079.1(e).

Code, §6086.65(d). The member may thereafter petition for review of the Review Department's recommendations in the California Supreme Court. Cal. Bus. & Prof. Code, §§6078, 6081, 6083, 6087; rule 952(a) of the California Rules of Court. If review is granted, the California Supreme Court conducts an independent examination of the entire record, weighs the evidence and passes upon its sufficiency. Alberton v. State Bar, 37 Cal.3d 1, 11, 206 Cal.Rptr. 373, 686 P.2d 1177 (1984), cert. den 470 U.S. 1007, 105 S.Ct. 1366, 84 L.Ed.2d 386 (1985). In all cases, the ultimate determination as to the degree of discipline to be imposed is made by the California Supreme Court. McCray v. State Bar, 38 Cal.3d 257, 272, 211 Cal. Rptr. 691, 696 P.2d 83 (1985).

B. Statement of Facts.

The facts pertinent to this case are

as follows:

Petitioner was admitted to the practice of law in California in December 1982. (Petitioner's Appendix 5a.) On or about August 11, 1988, the Office of Trial Counsel of the State Bar commenced formal disciplinary proceedings against petitioner in the State Bar Court. Petitioner was charged with numerous counts of attorney misconduct, dating from November 1983 to May 1985, and covering allegations that petitioner had failed to perform, misappropriated client funds and abandoned clients. (Petitioner's Appendix 5a.)

From August 1988 to late April 1989, various pretrial proceedings took place in the State Bar's disciplinary action against petitioner. During this pretrial period, petitioner claimed that she was the subject of a racially biased, bad

faith, selective prosecution. During the course of the trial, petitioner also filed motions to disqualify the hearing referee. (Petitioner's Appendix 19a-32a.)

On April 28, 1989, in an attempt to stay her disciplinary proceedings, petitioner filed an action in federal court, Frazier v. State Bar of California et. al., United States District Court, Central District of California, Case No. 89-2586 WDK, requesting declaratory and injunctive relief in the form of a preliminary injunction enjoining the State Bar from proceeding with the disciplinary action. Petitioner claimed that she was being prevented in the disciplinary proceedings from presenting her constitutional claims of racial and gender discrimination. Petitioner also contended that she was being subjected to an unconstitutionally selective and

discriminatory prosecution. Petitioner argued that the denial of her discovery requests defeated her attempts to develop a case of systemic bias based on race and gender on the part of the State Bar. (Respondent's Appendix A-4, A-5, A-8.)[3]

On May 5, 1989, the district court denied petitioner's application for a preliminary injunction, abstaining under Younger v. Harris, supra, 401 U.S. 37. In denying the application, the district

---

[3]For the Court's convenience, respondent has appended to its opposition brief, a copy of the unpublished decision of the United States Court of Appeals for the Ninth Circuit in Frazier v. State Bar of California, et al., No. 89-55675, D.C. No. CV 89-2586-WDK, filed January 14, 1991 in which the Ninth Circuit affirmed the district court's dismissal of petitioner's federal action on abstention grounds. In so doing, the court of appeals conveniently summarized the nature of petitioner's constitutional claims and the underlying basis for the district court's holding. All references to "Respondent's Appendix" are references to the copy of this decision.

court held that petitioner's rights were adequately protected and that there were no extraordinary circumstances or proven bias that precluded the court from abstaining. (Respondent's Appendix A-5.)[4]

---

[4] In so doing, the district commented:

> You're not dealing with an organization here who is terribly unresponsive. Quite to the contrary. This is not that type of organization at all. And in my view they have been deeply solicitous to minority interests. I don't find that there is any type of exceptional circumstance here that would allow you to basically bring your claims to this Court, . . . I don't think you can avoid Younger under the circumstances. I don't think you presented the facts to avoid it. . . .
>
> This Court must dismiss. [Petitioner's] rights are adequately protected. There are no extraordinary circumstances or proven bias on the part of the State Bar which would preclude the application of the abstention doctrine. (Reporter's Transcript of Proceeding, May 5, 1989, Frazier v. State Bar of California,

Petitioner appealed from the district court's order to the Ninth Circuit Court of Appeals. On January 14, 1991, in an unpublished opinion, the Ninth Circuit affirmed the dismissal of petitioner's federal action on abstention grounds. In so doing, the court of appeals emphasized that even if it were true that petitioner could not adequately raise her constitutional claims in State Bar Court because of alleged institutional bias, the State Bar Act provided for adequate judicial review of her disciplinary proceedings. (Respondent's Appendix A-8, A-9; Cal. Bus. & Prof. Code §6082, §6083.) The court also held:

> There was no specific factual evidence that the disciplinary proceedings were brought merely to harass or simply because

---

> United States District Court, Central District of California, pp. 17:4-14, 21:20-24.)

> [petitioner] is a Black woman. In fact, many of the former clients who initiated complaints against [petitioner] were black. . . .
>
> None of the evidence offered by [petitioner] was sufficient to overcome the presumption that the State Bar and the California Supreme Court were unbiased. The district court correctly determined that there were 'no extraordinary circumstances or proven bias on the part of the State Bar.' (Respondent's Appendix A-11.)

After extensive hearings in the disciplinary proceedings, a State Bar Court hearing referee concluded that petitioner had: abandoned seven clients; failed to return unearned fees to five clients; failed to perform legal services competently for seven clients; committed various acts of moral turpitude and dishonesty; failed to return advanced costs and other client funds to which three clients were entitled; failed to deposit client funds in a trust account;

and wilfully accepted employment for which she had not the time, skill and resources to perform with competence, all in violation of California's Rules of Professional Conduct. (Petitioner's Appendix 5a-7a.)

The hearing referee further opined that the nature of petitioner's misconduct, coupled with aggravating factors, such as her past suspension for nonpayment of fees, her failure to cooperate at the hearing, and bad faith toward and harm to her former clients, warranted disbarment. (Petitioner's Appendix 8a.)

The Review Department of the State Bar Court, upon its independent review of the record, made modifications to the Hearing Department's findings of fact and conclusions of law and reduced the Hearing Department's recommended discipline of

disbarment to suspension. (Petitioner's Appendix 10a-11a.) Nevertheless, in reducing the recommended discipline, the Review Department emphasized the serious nature of petitioner's misconduct:

> [W]e find [petitioner] culpable of serious misconduct, commencing just over one year after her admission. . . .
>
> We find this misconduct to warrant serious discipline, but given [petitioner's] mitigating and rehabilitative evidence, we do not conclude, as did the referee, that disbarment is required. The protection of the public interest and the profession will be served in this matter by a five year suspension stayed on conditions of three years actual suspension and until restitution and rehabilitation are proven as well as placement on a period of supervised probation on terms outlined at the conclusion of this opinion. (Petitioner's Appendix 9a-11a.)

The Review Department also examined and rejected petitioner's numerous contentions that she was denied a fair trial because

of allegedly discriminatory pre-trial proceedings and bias of the hearing referee. (Petitioner's Appendix 19a-32a.) Regarding issues concerning pre-trial discovery, the Review Department noted that the State Bar examiner had provided what documents it had in connection with the allegations in the complaint. However, the examiner was unable to provide any information concerning the race, gender or practice of members of the California bar, or other statistical data sought by petitioner, as such information was not gathered or maintained by the State Bar's membership records. (Petitioner's Appendix 20a-21a.) In upholding the hearing referee's denial of petitioner's motion to compel this discovery, the Review Department stated:

> The denial of [petitioner's] motion to compel discovery does not demonstrate a denial of due

> process. Had the information sought been maintained by the State Bar, then [petitioner's] motion to compel would have carried more weight. . . . [Petitioner's] claim of bias is highly generalized and such broad claims have been rejected previously. (Cf In re Utz (1989) 48 Cal.3d 468, 477-478.) (Petitioner's Appendix 22a.)

In affirming the Assistant Presiding Referee's denial of petitioner's various motions to disqualify her hearing referee on the ground that he was biased, the Review Department further commented:

> The assigned hearing judge or referee is entitled to exert **reasonable control over the conduct of proceedings.** (citations omitted) Requiring one counsel to question a witness from beginning to end, asking that [petitioner] not speak to her attorneys while the hearing referee is addressing counsel and expecting that counsel will note their objections for the record and move forward with the hearing are not unreasonable standards for courtroom behavior, do not deprive [petitioner] of the statutory recognition of legal assistance during her

> disciplinary hearing (See Bus. & Prof. Code, §6085(b)) and do not, without more, constitute bias on the referee's part. (Petitioner's Appendix 29a, emphasis added.)

Finally, the Review Department reviewed and rejected as meritless two additional claims propounded by petitioner regarding the alleged bias of the hearing referee, both of which are raised in the instant petition for writ of certiorari. The first claim concerned the hearing referee's contact, for scheduling purposes, with a judge presiding over a criminal jury trial in New York in which petitioner represented the defendant. The second claim concerned the hearing referee's recommendation to the State Bar Office of Trial Counsel that it should investigate the conduct of petitioner's two attorneys for possible revocation of their pro hac vice status, based on

misconduct during the disciplinary proceedings. (Petitioner's Appendix, 29a-32a.)

On April 6, 1992, petitioner requested that the California Supreme Court review the decision and recommendations of the Review Department. In so doing, petitioner again challenged her disciplinary proceedings on constitutional grounds, raising the same contentions regarding denial of discovery, institutional bias and alleged judicial misconduct which had been raised and rejected both in State Bar Court and federal court. (See Petition for Writ of Certiorari, pp. 17-18.)

The petition for writ of review to the California Supreme Court was denied on June 15, 1992. (Petitioner's Appendix 1a-3a.) Petitioner now files the instant petition for writ of certiorari, once

again raising the same constitutional challenges to her disciplinary proceedings.

III

ARGUMENT

Respondent respectfully submits that this petition for writ of certiorari should be denied. Petitioner has failed to allege grounds for review under Rule 10. Moreover, petitioner's contention that the abstention doctrine has precluded her from raising her constitutional claims in an unbiased tribunal is without merit. On the contrary, petitioner's claims of bias and selective prosecution have been raised and rejected by the Review Department of the State Bar Court, the California Supreme Court, the United States District Court and the Ninth Circuit Court of Appeals.

In short, petitioner was disciplined

solely because she was culpable of egregious misconduct. Apparently, petitioner cannot accept this fact, but chooses instead to repeatedly assert baseless allegations of bias in an attempt to divert attention from her misdeeds. Petitioner must not be allowed to waste the Court's time with these generalized and groundless claims. Her petition for writ of certiorari should be denied.

A. Under Rule 10 of the Rules of the Supreme Court of the United States, Petitioner has Failed to Allege Grounds for the Exercise of this Court's Discretionary Review.

"Appeals are a matter of right while decisions on certiorari petitions are wholly discretionary." Durham v. United States, 401 U.S. 481, 483 fn."*", 91 S.Ct. 858, 860, fn."*" (1971), overrul'd on other grounds in Dove v. United States, 423 U.S. 325, 96 S.Ct. 579, 46 L.Ed.2d 531

(1976).

Pursuant to Rule 10, a review on writ of certiorari will only be granted when there are "special and important reasons" therefor. The Court does not ". . .sit for the benefit of the particular litigants." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed 897 (1955)(citations omitted). "Special and important reasons" imply a "reach to a problem beyond the academic or the episodic." Id. at 616.

Rule 10 provides in pertinent part that the "character of reasons" which will be considered for review are as follows: (a) when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way which conflicts with a state court of last

resort; (b) when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort; or (c) when a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

In this case, petitioner is asking the Court to sit for the benefit of a particular litigant. She has raised no applicable grounds for discretionary review under Rule 10. She cites no conflict between the circuits, between state courts of last resort or between a federal court of appeal and a state court of last resort. Neither does she contend that the California Supreme Court has decided an important question of federal

law that either should be decided by this Court or that conflicts with applicable decisions of this Court. Rather, petitioner appears to contend that discretionary review should be granted because the abstention doctrine has precluded her from having her generalized and groundless claims of constitutional violations heard in an unbiased tribunal.[5] For the reasons set forth herein, the State Bar respectfully submits that petitioner's contention is wholly without merit.

---

[5] Petitioner contends that ". . . this case presents an important issue of federal judicial policy and constitutional law with respect to the role of this Court in assuring the constitutionality of state disciplinary systems that are susceptible to economic and ideological self-interests and biases, given the unavailability of the District Courts to perform this function." (Petition for Writ of Certiorari, p. 25.)

B. **Petitioner's Claims of Constitutional Violations Have Been Fully Reviewed and Rejected by the Review Department of the State Bar Court and by the California Supreme Court.**

The Review Department of the State Bar Court, after independently examining the Hearing Department's record,[6] concluded that petitioner had not been subjected to selective prosecution or institutional bias but had received a full and fair hearing. (Petitioner's Appendix 19a-32a). Moreover, petitioner's allegations of constitutional violations, which she raised in her petition for review, were rejected by the California

---

[6] Rule 453 of the State Bar Transitional Rules of Procedure provides in pertinent part that: "[i]n all matters before the review department, that department shall **independently review** the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department." (emphasis added)

Supreme Court when it denied her petition. (Petition for Writ of Review, pp. 17-18; Petitioner's Appendix 1a-3a.) Thus, petitioner's claims of bias and discrimination by the hearing department referee have been raised and rejected at every level of review within the state system.

As the Ninth Circuit emphasized in its order dated January 14, 1991, California's attorney disciplinary scheme provides for independent state judicial review of the findings and recommendations of the State Bar Court, thereby making abstention under Younger possible. (Respondent's Appendix A-7 through A-9; Cal. Bus. & Prof. Code §6082, §6083.) Specifically, an attorney may petition to the California Supreme Court directly for review of any decision of the State Bar Court recommending disbarment, suspension,

or lesser discipline. (See rule 952(a)-(c) of the California Rules of Court.) The court of appeals noted that under Younger, supra, 401 U.S. 37, and its progeny, even if a federal plaintiff cannot raise her constitutional claims in state administrative proceedings, her ability to raise the claims via state judicial review of the administrative proceedings suffices to support abstention. (Respondent's Appendix A-8, A-9.)

Thus, when she petitioned the California Supreme Court for review of the Review Department's recommendations pursuant to California's disciplinary scheme, petitioner had ample opportunity to convince that unbiased and independent tribunal of the merits of her claims of systemic bias and discrimination on the part of the State Bar. The California

Supreme Court was of course unpersuaded by her arguments and summarily denied her petition for review. (Petitioner's Appendix 1a-3a.)

C. Both the United States District Court and the Ninth Circuit Court of Appeals Have Held That Petitioner Has Failed to Demonstrate Bias or Discrimination on the Part of the State Bar.

Both the United States District Court, Central District of California, and the Ninth Circuit Court of Appeals concluded, after examining petitioner's contentions presented during the course of her declaratory relief action, that she had utterly failed to make a showing of harassment or bias for purposes of creating an exception to abstention under Younger, supra, 401 U.S. 37. In fact, the district court specifically held and the Ninth Circuit affirmed that petitioner

demonstrated "no extraordinary circumstances or proven bias on the part of the State Bar." (Respondent's Appendix A-11.)

Petitioner could prove no bias because there was none. In essence, petitioner was prosecuted by the State Bar of California and disciplined by the California Supreme Court for one reason and one reason only: she was culpable of egregious misconduct as an attorney.

D. The Fact that Disciplinary Proceedings Before the State Bar Hearing Department Were Conducted Prior to 1989 Procedural Reforms, Provides No Basis for the Granting of Discretionary Review.

Finally, petitioner appears to contend that, because the original disciplinary proceedings before the State Bar Court Hearing Department referee were administered prior to implementation of the "new" disciplinary system in 1989, she

was subjected to selective prosecution and institutional bias. Even assuming she was subjected to a biased prosecution by the volunteer hearing referee, which she most certainly was not, petitioner herself points out that the independent review of the record conducted by the Review Department of the State Bar Court was administered under the "new" disciplinary system. (Petition for Writ of Certiorari, pp. 30-31; Petitioner's Appendix 26a.)[7]

The "new" Review Department, after an extensive independent review of the record, found that petitioner's claims of

---

[7] In fact, Rule 452 of the State Bar's Transitional Rules of Procedure guarantees Review Department scrutiny. Specifically, rule 452 provides, as an added procedural safeguard, that even if a member does not request review of a Hearing Department decision, if the proceedings were commenced prior to the 1989 reforms, the Hearing Department's decision will automatically be reviewed ex parte by the Review Department.

institutional bias, selective prosecution and discrimination were utterly meritless, found that she had committed egregious violations of the California Business and Professions Code and Rules of Professional Conduct, and recommended severe discipline.

IV

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

DATED: October 14, 1992

Respectfully submitted,

DIANE C. YU
RICHARD J. ZANASSI
DOMINIQUE SNYDER

Richard J. Zanassi
Counsel of Record

Attorneys for The State Bar of California

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALVAADER FRAZIER,	) No. 89-55675
Plaintiff-Appellant,	) D.C. No. CV 89-2586-WDK
v.	)
STATE BAR OF CALIFORNIA; TERRY ANDERLINI,	) MEMORANDUM[1]
Defendants-Appellees.	)

On Appeal From the United States District Court for the Central District of California
William D. Keller, District Judge, Presiding

Before: BEEZER and TROTT, Circuit Judges, and CROCKER,[2] District Judge

The district court abstained from

---

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[2]The Honorable M.D. Crocker, United States District Judge for the Eastern District of California, sitting by designation.

enjoining the attorney disciplinary proceedings that were pending before the State Bar Court of California against Alvaader Frazier. Frazier appeals the district court's denial of her request for preliminary injunction and its sua sponte abstention and dismissal under Younger v. Harris. We affirm.

Frazier, an African-American woman, was admitted to the practice of law in California on December 3, 1982. Shortly thereafter, she opened a general practice law office in South Central Los Angeles, as a sole practitioner. The majority of her clients were Black and Latino, low income individuals with problems in the areas of housing, public benefits, family matters, and criminal law.

From December 1982 to May 1985, Frazier was retained by nearly 500 clients. In May 1985, Frazier closed her

practice because of a family crisis. She notified the State Bar of California (State Bar) and attempted to inform her clients of the closing. She also attempted to provide her clients with names of attorneys who would be willing to accept employment as successor counsel.

On August 11, 1988, the Office of Trial Counsel of the State Bar commenced a formal disciplinary hearing against Frazier in the State Bar Court. The Notice to Show Cause contained fifteen counts covering allegations that Frazier had failed to perform, misappropriated moneys and abandoned clients.

From August 1988 to late April 1989, various pretrial proceedings took place in the State Bar's disciplinary proceeding against Frazier. It was during this pretrial period that Frazier's claim that she is the subject of a racially based,

bad faith, selective prosecution first surfaced.

In March 1989, Frazier sought discovery from the State Bar on the racial and gender breakdown of all members against whom disciplinary proceedings had been filed. She also requested similar statistical data about members against whom charges were dropped, and about referees who were appointed to take part in the disciplinary proceedings.

Frazier states that she was denied this crucial discovery. The State Bar states that she was provided with all information, to the extent that it was available, but that the State Bar does not keep the kind of records that Frazier was seeking.

On April 28, 1989, Frazier filed an action in federal court requesting declaratory and injunctive relief in the

form of a preliminary injunction enjoining the State Bar from proceeding in her disciplinary action or a preliminary injunction staying the disciplinary proceedings until the California Supreme Court had entertained a petition from Frazier for review of her constitutional claim.

On May 5, 1989, the district court heard Frazier's application for a Temporary Restraining Order. The district court denied the application and decided to dismiss Frazier's action under the Younger abstention doctrine. The court held that Frazier's rights were adequately protected and that there were no extraordinary circumstances or proven bias that would preclude the court from abstaining. On May 12, 1989, a written order was filed confirming the court's earlier ruling at the May 5th hearing.

The district court's order was entered on May 18, 1989, and Frazier timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. Abstentions on the basis of Younger v. Harris, 401 U.S. 37 (1971), are reviewed de novo. Partington v. Gedan, 880 F.2d 116, 120 (9th Cir. 1989). Our review of the district court's abstention is limited to the record before the district court at the time of the hearing on Frazier's motion for a Temporary Restraining Order.

In Younger, the Supreme Court noted Congress' demonstrated intent to protect state court proceedings from federal intervention. 401 U.S. at 43. This intent is spelled out in 28 U.S.C. § 2283 (1988), which provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where

> necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Younger Court also noted that besides the three narrow exceptions established by Congress, there is only one judicial exception to the rule against enjoining a state court proceeding. The judicial exception exists when a person can show that he will suffer irreparable damages if his prosecution in state court is not enjoined. 401 U.S. at 43.

In Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982), the Supreme Court held that Younger abstention applies to pending state bar disciplinary proceedings. The Middlesex Court stated that the pertinent inquiry in reviewing state proceedings, such as the State Bar disciplinary proceedings brought against Frazier, is

the question whether the proceedings provide an adequate basis for raising constitutional claims. Id. at 432.

Frazier applied for an injunction against the State Bar on the ground that she was being blocked in the disciplinary proceedings from presenting her constitutional claims of racial discrimination. Frazier does not contend that California law fails to provide for review of any findings or recommendation that call for disciplinary action. She asserts rather that the actions of the State Bar in her proceedings demonstrates that she was precluded from raising her constitutional claims. She states that the denial of her discovery requests defeated her attempts to develop a case of systematic bias based on race and gender.

In Partington v. Gedan, we held that under Younger abstention, "even if a

federal plaintiff cannot raise his constitutional claims in state administrative proceedings that implicate important state interests, his ability to raise the claims via state judicial review of the administrative proceedings suffices." 880 F.2d at 124. The fact that Frazier may have been frustrated in her initial attempts to raise her constitutional claims of discrimination did not create an exception to Younger.

Nor would the California Supreme Court have to take Frazier's discovery issues on interlocutory appeal. Partington requires only that Frazier have an opportunity for state judicial review. The California disciplinary proceedings provide for such a review. See Cal. Bus. & Prof. Code § 6082 (West 1990). The district court correctly abstained on the ground that Frazier had sufficient

opportunity to present her constitutional claims.

Frazier further asserts that abstention was improper because a showing of harassment or bias creates an exception to Younger abstention. Frazier's analysis of the law is correct. See Partington, 880 F.2d at 124. However, her assertion that she made a showing of bias before the district court fails. Frazier must overcome the presumption that the State Bar and the California Supreme Court are unbiased. See Partington, 880 F.2d at 124. This presumption can be rebutted "by a showing of conflict of interest or some other specific reason for disqualification." Schweiker v. McClure, 456 U.S. 188, 195 (1982).

The record before the district court merely demonstrated that Frazier was having difficulty raising her claim of

discriminatory prosecution. There was no specific factual evidence that the disciplinary proceedings were brought merely to harass or simply because Frazier is a Black woman. In fact, many of the former clients who initiated complaints against Frazier were black.

None of the evidence offered by Frazier was sufficient to overcome the presumption that the State Bar and the California Supreme Court were unbiased. The district court correctly determined that there were "no extraordinary circumstances or proven bias on the part of the State Bar."

AFFIRMED.

[stamped]

FILED JANUARY 14, 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DECLARATION OF SERVICE BY MAIL

I, Joan E. Bender, declare as follows:

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On October 14, 1992, I served the within

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

on petitioner by placing three copies thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed to petitioner's counsel of record as follows:

Arthur R. Block, Esq.
250 West 57th Street
Suite 317
New York, New York 10019

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 14th day of October, 1992, at San Francisco, California.

Joan Bender

Supreme Court, U.S.
FILED
OCT 23 1992
OFFICE OF THE CLERK

No. 92-448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALVAADER FRAZIER,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARTHUR R. BLOCK
Counsel of Record for Petitioner
250 West 57th Street
Suite 317
New York, New York 10019
(212) 956-5550

Of Counsel:
ARTHUR R. BLOCK
MICHAEL A. HARDY
LAWRENCE A. GRIGSBY

BEST AVAILABLE COPY

ARGUMENT

Point A of the Brief for Respondent in Opposition to Petition is entitled: "Both the United States District Court and the Ninth Circuit Court of Appeals Have Held That Petitioner Has Failed to Demonstrate Bias or Discrimination on the Part of the State Bar." This statement materially misrepresents the timing and substance of the referenced federal court rulings.

The district court held its hearing on petitioner's motion for a preliminary injunction on May 5, 1988. This was prior to the commencement of trial proceedings in the State Bar Court. Hence, the record before the district court and, of course, the record on appeal before the court of appeals, was solely based on pretrial events and rulings.

As a result of the district court's denial of the motion for a preliminary

injunction, the trial proceedings commenced in the State Bar Court on May 8, 1989. They continued intermittently for nearly eleven months, until March 21, 1990. None of the facts concerning the State Bar Court trial proceedings and the extensive motion practice during the course of the trial, e.g. the motions to disqualify the hearing referee and to dismiss the proceedings for highly prejudicial due process violations, have ever been considered by a federal court.

Several of grounds for the instant petition are based on these facts (see, e.g., Petition at 33-55). The respondent has substituted its misleading argument point for a substantive response to the heart of petitioner's argument. It is respectfully submitted that respondent's

avoidance of the central issues in this case is a further demonstration of the merit of the petition.

CONCLUSION

For the reasons set forth herein and in the Petition the writ should be granted.

Respectfully submitted,

Arthur R. Block
Counsel of Record
for Petitioner
250 West 57th Street
Suite 317
New York, NY 10019
(212) 956-5550

Of Counsel
Arthur R. Block
Michael A. Hardy
Lawrence A. Grigsby

October 22, 1992